DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1293
Title: Federal Communications Commission, et al., Petitioners
v.
Fox Television Stations, Inc., et al.
Docketed: April 22, 2011
Linked with 10A794
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (06-1760-ag, 06-2750-ag, 06-5358-ag)
Decision Date: July 13, 2010
Rehearing Denied: November 22, 2010
Rule 12.4

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 10 2011	Application (10A794) to extend the time to file a petition for a writ of certiorari from February 20, 2011 to March 22, 2011, submitted to Justice Ginsburg.
Feb 10 2011	Application (10A794) granted by Justice Ginsburg extending the time to file until March 22, 2011.
Mar 10 2011	Application (10A794) to extend further the time to file a petition for a writ of certiorari from March 22, 2011 to April 21, 2011, submitted to Justice Ginsburg.
Mar 10 2011	Application (10A794) granted by Justice Ginsburg extending the time to file until April 21, 2011.
Mar 25 2011	Application (10A949) to extend the time to file a petition for a writ of certiorari from April 4, 2011 to May 4, 2011, submitted to Justice Ginsburg.
Mar 25 2011	Application (10A949) granted by Justice Ginsburg extending the time to file until May 4, 2011.
Apr 21 2011	Petition for a writ of certiorari filed. (Response due May 23, 2011)
May 2 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent Fox Television Stations, Inc.
May 19 2011	Brief amicus curiae of Parents Television Council filed.
May 23 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for NBC.
May 23 2011	Brief of respondents ABC Television Affiliates Association, et al. in opposition filed.
May 23 2011	Brief of respondent Intervenors Center for Creative Voices in Media, et al. in opposition filed.
May 23 2011	Brief of respondents Fox Television Stations, Inc., CBS Broadcasting Inc., NBC Universal, Inc., et al. in opposition filed.
May 23 2011	Brief of respondents ABC, Inc., KTRK Television, Inc., and WLS Television, Inc. in

	opposition filed.
May 23 2011	Consent to the fiing of amicus briefs, in support of either party or of neither party, received from counsel for respondent CBS Broadcasting, Inc.
Jun 7 2011	DISTRIBUTED for Conference of June 23, 2011.
Jun 9 2011	Reply of petitioners Federal Communications Commission, et al. filed. (Distributed)
Jun 27 2011	Petition GRANTED limited to the following question: Whether the Federal Communications Commission s current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution. . Justice Sotomayor took no part in the consideration or decision of this petition.
Jun 28 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents ABC, Inc., KTRK Television, Inc. and WLS Television.
Jun 29 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents NBC Universal Inc., and NBC Telemondo License Company.
Jun 29 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent CBS Broadcasting, Inc.
Jun 29 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Fox Television Stations, Inc.
Jun 29 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents Center for Creative Voices in Media, and the Future of Music Coalition.
Jul 1 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents ABC Television Affiliates Association, et al.
Jul 8 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from the Solicitor General.
Jul 22 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including September 7, 2011.
Jul 22 2011	The time to file respondents' briefs on the merits is extended to and including November 3, 2011.
Sep 7 2011	Joint appendix filed.
Sep 7 2011	Brief of petitioners Federal Communications Commission, et al. filed.
Sep 12 2011	Brief amicus curiae of National Religious Broadcasters filed.
Sep 13 2011	Brief amicus curiae of Morality in Media, Inc. filed.
Sep 13 2011	Brief amicus curiae of Decency Enforcement Center for Television filed.
Sep 14 2011	Brief amicus curiae of American Center for Law and Justice in support of neither party filed.
Sep 14 2011	Brief amici curiae of American College of Pediatricians and the Christian Medical and Legal Association filed.
Sep 14 2011	Brief amici curiae of Judith A. Reisman, Ph.D. and Liberty Counsel filed.
Sep 14 2011	Brief amici curiae of Focus on the Family and Family Research Council filed.
Sep 14 2011	Brief amici curiae of Yale Law School Information Society Project Scholars, et al. filed.
Sep 14 2011	Brief amicus curiae of Parents Television Council filed.
Nov 2 2011	Joint motion of respondents for divided argument filed.
Nov 3 2011	Brief of respondents CBS Television Network Affiliates Association and NBC Television

	Affiliates filed.
Nov 3 2011	Brief of respondents Fox Television Stations, Inc., et al. filed.
Nov 3 2011	Brief of respondents ABC Television Affiliates Association, et al. filed.
Nov 3 2011	Brief of respondents Center for Creative Voices in Media, et al. filed.
Nov 3 2011	Brief of respondents ABC, Inc., KTRK Television, Inc., and WLS Television, Inc. filed.
Nov 7 2011	Brief amici curiae of Pennsylvania Center for the First Amendment, et al. filed.
Nov 7 2011	Letter from counsel for respondents ABC, Inc., KTRK Television, Inc., and WLS Television, Inc. proposing to lodge copies of charts (cited to in their brief on the merits) drawn from data in proprietary Nielsen databases.
Nov 8 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the CBS Television Network Affiliates Assn. and NBC Television Affiliates.
Nov 9 2011	Brief amici curiae of Former FCC Officials filed.
Nov 9 2011	Brief amici curiae of American Academy of Pediatrics, et al. filed.
Nov 10 2011	Brief amici curiae of The Student Press Law Center and College Broadcasters, Inc. filed.
Nov 10 2011	Brief amici curiae of The Reporters Committee for Freedom of the Press, et al. filed.
Nov 10 2011	Brief amici curiae of National Association of Broadcasters, et al. filed.
Nov 10 2011	Brief amici curiae of The Cato Institute, et al. filed. (Distributed)
Nov 10 2011	Brief amicus curiae of Public Broadcasting Service filed. (Distributed)
Nov 10 2011	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Nov 10 2011	Brief amici curiae of The Thomas Jefferson Center for the Protection of Free Expression and the Media Institute filed. (Distributed)
Nov 14 2011	SET FOR ARGUMENT ON Tuesday, January 10 , 2012.
Nov 15 2011	CIRCULATED.
Nov 22 2011	Motion for divided argument filed by respondent GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.
Dec 6 2011	Reply of petitioners Federal Communications Commission, et al. filed. (Distributed)
Dec 22 2011	Adminstrative record received from FCC. (1 Box)
Jan 4 2012	Record received from U.S.C.A. for 2nd Circuit. (1 Box)
Jan 10 2012	Argued. For petitioners: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. For respondents Fox Television Stations, Inc., et al.: Carter G. Phillips, Washington, D. C. For respondents ABC, Inc., et al.: Seth P. Waxman, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

JOSEPH R. PALMORE
Assistant to the Solicitor General

THOMAS M. BONDY
ANNE MURPHY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

AUSTIN C. SCHLICK
General Counsel

PETER KARANJIA
Deputy General Counsel

JACOB M. LEWIS
Associate General Counsel

NANDAN M. JOSHI
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTIONS PRESENTED

1. Whether the court of appeals erred in invalidating a finding by the Federal Communications Commission (FCC) that a broadcast including expletives was indecent within the meaning of statutory and regulatory prohibitions on indecent broadcasts, on the ground that the FCC's context-based approach to determining indecency is unconstitutionally vague in its entirety.

2. Whether the court of appeals erred in invalidating a finding by the FCC that a broadcast including nudity was indecent within the meaning of statutory and regulatory prohibitions on indecent broadcasts, on the ground that the FCC's context-based approach to determining indecency is unconstitutionally vague in its entirety.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

The following respondents were petitioners in the court of appeals in *Fox Televisions Stations* v. *FCC* (App., *infra*, 1a-34a): Fox Television Stations, Inc., CBS Broadcasting Inc., WLS Television, Inc., KTRK Television, Inc., KMBC Hearst-Argyle Television, Inc., and ABC Inc.

The following respondents were intervenors in the court of appeals in *Fox Televisions Stations* v. *FCC*: NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates, Center for the Creative Community, Inc., doing business as Center for Creative Voices in Media, Inc., and ABC Television Affiliates Association.

The following respondents were petitioners in the court of appeals in *ABC, Inc.* v. *FCC* (App., *infra*, 118a-125a): ABC Inc., KTRK Television, Inc., WLS Television, Inc., Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television Inc., WSIL-TV, Inc., ABC Television Affiliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, Duhamel Broadcasting Enterprises, Gray Television License, Incorporated, KATC Communications, Incorporated, KATV LLC, KDNL Licensee LLC, KETV Hearst-Argyle Television Incorporated, KLTV/KTRE License Subsidiary LLC, KSTP-TV LLC, KSWO Television Company Incorporated, KTBS Incorporated, KTUL LLC, KVUE Television Incorporated, McGraw-Hill Broadcasting Company Incorporated, Me-

dia General Communications Holdings LLC, Mission Broadcasting Incorporated, Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting Incorporated, NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television Inc., Piedmont Television of Huntsville License LLC, Piedmont Television of Springfield License LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations San Antonio Inc., Scripps Howard Broadcasting Co., Southern Broadcasting Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans Inc., WAPT Hearst-Argyle Television Inc., WDIO-TV LLC, WEAR Licensee LLC, WFAA-TV Inc., and WISN Hearst-Argyle Television Inc.

The following respondents were intervenors in the court of appeals in *ABC, Inc.* v. *FCC*: Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., and CBS Broadcasting, Inc.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutes and regulations involved 2
Statement 2
Reasons for granting the petition 17
I. The court of appeals' rulings conflict with decisions of this Court and the D.C. Circuit 18
II. The Commission's indecency policy is not unconstitutionally vague 25
III. The adverse consequences of the court of appeals' decisions are sweeping and unavoidable 29
Conclusion 32
Appendix A – Court of appeals opinion (*Fox*) (July 13, 2010) 1a
Appendix B – Order (*Fox*) (Nov. 6, 2006) 35a
Appendix C – Court of appeals rehearing denial (Nov. 22, 2010) 116a
Appendix D – Summary order (*ABC*) 118a
Appendix E – Forfeiture order (*ABC*) (Feb. 19, 2008) 126a
Appendix F – Notice of apparent liability for forfeiture (*ABC*) (Jan. 25, 2008) 215a
Appendix G – Statutory provisions 263a

TABLE OF AUTHORITIES

Cases:

Action for Children's Television v. *FCC*:
852 F.2d 1332 (D.C. Cir. 1988) 5, 6, 21, 22, 30
932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992) 6, 21

Cases—Continued: Page

58 F.3d 654 (D.C. Cir. 1995), cert. denied, 516 U.S. 1043 (1996) 3, 6, 21
CBS, Inc. v. *FCC*, 453 U.S. 367 (1981) 29
Connally v. *General Constr. Co.*, 269 U.S. 385 (1926) 6
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) ..... *passim*
FCC v. *Pacifica Found.*, 438 U.S. 726 (1978) ..... *passim*
Fox Television Stations, Inc. v. *FCC*, 489 F.3d 444 (2d Cir. 2007), rev'd, 129 S. Ct. 1800 (2009) 10, 11
Ginsberg v. *New York*, 390 U.S. 629 (1968) 4
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 25
Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 23, 26
Holder v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010) 17, 23, 25
Infinity Broad. Corp., In re, 3 F.C.C.R. 930 (1987) 5, 24, 30
Pacifica Found. v. *FCC*, 556 F.2d 9 (D.C. Cir. 1977), rev'd, 438 U.S. 726 (1978) 25
Pacifica Found., Inc., In re., 2 F.C.C.R. 2698 (1987) 5
Smith v. *Goguen*, 415 U.S. 566 (1974) 25
United States v. *National Dairy Prods. Corp.*, 372 U.S. 29 (1963) 28
United States v. *Williams*, 553 U.S. 285 (2008) 20, 25, 27, 28
United States Civil Serv. Comm'n v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) 26
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 25

Cases—Continued: Page

WPBN/WTOM License Subsidiary, Inc., In re, 15 F.C.C.R. 1838 (2000) 31

WUHY-FM, Eastern Educ. Radio, In re, 24 F.C.C. 2d 408 (1970) 23

Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) 23

Constitution, statutes, regulation and rule:

U.S. Const. Amend. I 4, 18

Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949:

Section 16, 106 Stat. 954 26

Section 16(a), 106 Stat. 954 2

18 U.S.C. 1464 ..... 2, 3, 9, 26

47 U.S.C. 307 3

47 U.S.C. 309(k) 3

47 U.S.C. 503(b)(1)(B) 3

47 U.S.C. 503(b)(1)(D) 3

47 C.F.R.:

Section 73.3999 3

Section 73.3999(b) 27

Sup. Ct. R. 12.4 31

Miscellaneous:

Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y., In re, 56 F.C.C. 2d 94 (1975) 3, 19, 26

Miscellaneous—Continued: Page

Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, In re, 19 F.C.C.R. 4975 (2004) .. 7, 8

Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan", In re, 20 F.C.C.R. 4507 (2005) 30

Complaints By Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material, In re, 20 F.C.C.R. 1931 (2005) 26

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, In re, 21 F.C.C.R. 2664 (2006) 9, 13

Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, In re, 16 F.C.C.R. 7999 (2001) 6, 7, 24, 26

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Federal Communications Commission and the United States, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals in *Fox Television Stations, Inc.* v. *FCC* (App., *infra*, 1a-34a) is reported at 613 F.3d 317. The order of the Federal Communications

Commission under review in *Fox* (App., *infra*, 35a-115a) is reported at 21 F.C.C.R. 13,299. The opinion of the court of appeals in *ABC, Inc.* v. *FCC* (App., *infra*, 118a-125a) is not published in the *Federal Reporter* but is available at 2011 WL 9307. The order of the Federal Communications Commission under review in *ABC* (App., *infra*, 126a-214a) is reported at 23 F.C.C.R. 3147.

JURISDICTION

The judgment of the court of appeals in *Fox* was entered on July 13, 2010. A petition for rehearing was denied on November 22, 2010 (App., *infra*, 116a). On February 10, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *Fox* to and including March 22, 2011. On March 10, 2011, Justice Ginsburg further extended the time within which to file a petition for a writ of certiorari in *Fox* to and including April 21, 2011. The judgment of the court of appeals in *ABC* was entered on January 4, 2011. On March 25, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *ABC* to and including May 4, 2011. The jurisdiction of this Court in both *Fox* and *ABC* is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are set out in an appendix to this petition. App., *infra*, 263a-267a.

STATEMENT

1. Under 18 U.S.C. 1464, it is unlawful to "utter[] any obscene, indecent, or profane language by means of radio communication." Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106

Stat. 954, directs that "[t]he Federal Communications Commission [FCC or Commission] shall promulgate regulations to prohibit the broadcasting of indecent programming" during specified hours of the day. The Commission has implemented those statutory provisions by adopting regulations that prohibit broadcast licensees from airing "any material which is obscene" or, "on any day between 6 a.m. and 10 p.m.[,] any material which is indecent." 47 C.F.R. 73.3999; see *Action for Children's Television* v. *FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc) (*ACT III*), cert. denied, 516 U.S. 1043 (1996). The Commission is authorized to enforce Section 1464 and its indecency regulation by, *inter alia*, imposing civil forfeitures, 47 U.S.C. 503(b)(1)(B) and (D), or taking account of violations during license renewal proceedings, see 47 U.S.C. 307, 309(k).

2. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*), this Court upheld the FCC's application of the same "definition of indecent speech that [the FCC] uses to this day." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009) (*Fox*). At issue in *Pacifica* was the midday radio broadcast of George Carlin's "Filthy Words" monologue, which included repeated use of expletives. Responding to a listener complaint, the Commission determined that the broadcast of the Carlin monologue violated Section 1464 under a "concept of 'indecent' [that] is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica*, 438 U.S. at 731-732 (quoting *In re Citizen's Complaint Against Pacifica Found. Station*

WBAI(FM), New York, N.Y., 56 F.C.C. 2d 94, 98 (1975) (*Citizen's Complaint*). This Court concluded that the FCC's application of its definition of indecency to the Carlin monologue "as broadcast" did not violate the First Amendment. *Id.* at 735, 750-751.

The Court observed in *Pacifica* that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" because "material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748. The Court further observed that, because "broadcasting is uniquely accessible to children," indecent language can "enlarge[] a child's vocabulary in an instant." *Id.* at 749. The Court concluded that "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression" when that expression is disseminated through broadcast media. *Ibid.* (quoting *Ginsberg* v. *New York*, 390 U.S. 629, 639, 640 (1968)).

The Court in *Pacifica* emphasized that, under the nuisance rationale on which the Commission's decision rested, "context is all-important." 438 U.S. at 750; see *id.* at 742 (plurality opinion) ("indecency is largely a function of context"). The Court explained in particular that the "concept" of indecency used by the FCC "requires consideration of a host of variables," such as the "content of the program in which the language is used" and its effect on "the composition of the audience." *Id.* at 750.

3. For several years after *Pacifica*, the Commission followed an enforcement policy under which only "delib-

erate, repetitive use of the seven words actually contained in the George Carlin monologue" would be deemed actionably indecent. *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 12 (1987). In 1987, the Commission concluded that its post-*Pacifica* policy was "unduly narrow as a matter of law and inconsistent with [its] enforcement responsibilities under Section 1464." *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930 ¶ 5 (1987) (*Infinity Order*). The Commission therefore announced that, in determining whether a particular broadcast was indecent, it would instead use the "generic definition of indecency" articulated in its 1975 *Pacifica* order. *Ibid.* The Commission stated that, in determining whether particular material met that definition, it would consider, *inter alia*, whether the words or depictions used are "vulgar" or "shocking," whether the broadcast of such material is isolated or fleeting, the character of the audience, and the merit of the complained-of program as it relates to the broadcast's patent offensiveness. *Id.* at 932 ¶ 16 (footnotes omitted). The Commission declined, however, to develop a "comprehensive index or thesaurus of indecent words or pictorial depictions" of patently offensive material, explaining that it would be impossible "to construct a definitive list that would be both comprehensive and not overinclusive in the abstract, without reference to the specific context." *Id.* at 932 ¶ 14.

In 1988, the D.C. Circuit upheld the Commission's decision to move away from a policy focused exclusively on the list of words from the Carlin monologue and to instead make indecency determinations based on its generic definition of indecency. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (*ACT I*) (R.B. Ginsburg, J.). The petitioners in *ACT I* argued that the

Commission had failed adequately to explain its policy change. The court of appeals rejected that argument, stating that unless "*only* the seven dirty words are properly designated indecent[,] * * * some more expansive definition must be attempted" and "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Id.* at 1338.

The court in *ACT I* also rejected the contention that the Commission's definition of indecency was unconstitutionally vague. Observing that the "generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated" in *Pacifica*, and that this Court in *Pacifica* had held "the Carlin monologue indecent within the meaning of section 1464," the court "infer[red]" that "the term 'indecent' [is not] so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" 852 F.2d at 1338-1339 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The court reaffirmed that holding in addressing two later challenges to FCC indecency enforcement. See *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (*ACT II*) ("We have already considered and rejected a vagueness challenge to the Commission's definition of indecency."), cert. denied, 503 U.S. 913, 914 (1992); *ACT III*, 58 F.3d at 659 ("[W]e dismiss petitioners' vagueness challenge as meritless.").

4. In 2001, the Commission issued a policy statement "to provide guidance * * * regarding [its] case law interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 7999 ¶ 1

(2001) (*Industry Guidance*). That policy statement made clear that "[i]ndecency findings involve at least two fundamental determinations." *Id.* at 8002 ¶ 7. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Ibid.* Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8 (emphasis omitted).

The FCC's policy statement explained that the determination whether a broadcast is "patently offensive" turns on the "full context" in which the material is broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9 (emphasis omitted). The statement identified three "principal factors" that guide the analysis of patent offensiveness:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, [and] whether the material appears to have been presented for its shock value.

Id. at 8003 ¶ 10 (emphasis omitted).

4. In January 2003, the NBC network aired a live broadcast of the Golden Globe Awards. In accepting an award, the rock singer Bono exclaimed, "This is really, really f***ing brilliant. Really, really great." *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (2004) (*Golden Globe*

Awards Order). The Commission concluded that Bono's remark was indecent even though his use of the F-Word was not "sustained or repeated." *Id.* at 4980 ¶ 12. In explaining that conclusion, the Commission acknowledged that it was departing from prior agency decisions holding that "isolated or fleeting use[s] of the 'F-Word' or a variant thereof in situations such as this [are] not indecent," and it made clear that such cases "are not good law to that extent." *Ibid.* Under its revised policy, the Commission explained, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.* The Commission did not impose a sanction in the *Golden Globe Awards Order*, however, because the use of isolated expletives had not been proscribed by agency precedent at the time the broadcast occurred. *Id.* at 4981 ¶ 15.

5. The *Fox* case arises out of two broadcasts that aired before the Commission released the *Golden Globe Awards Order*. On December 9, 2002, Fox broadcast the 2002 Billboard Music Awards beginning at 8 p.m. Eastern Standard Time. During that broadcast, the entertainer Cher received an "Artist Achievement Award." In her acceptance speech, she stated: "I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em. I still have a job and they don't." App., *infra*, 89a.

Approximately one year later, on December 10, 2003, Fox again broadcast the Billboard Music Awards, which aired between 8 p.m. and 10 p.m. Eastern Standard Time. Nicole Richie and Paris Hilton, the stars of Fox's program "The Simple Life," presented one of the awards

that night. During their presentation, they engaged in the following exchange:

Paris Hilton:	Now Nicole, remember, this is a live show, watch the bad language.
Nicole Richie:	Okay, God.
Paris Hilton:	It feels so good to be standing here tonight.
Nicole Richie:	Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple.

App, *infra*, 42a-44a.

a. Following the two Billboard Music Awards broadcasts, the Commission received numerous complaints from viewers, and the agency issued an order concluding that both broadcasts contained "indecent" language as prohibited by 18 U.S.C. 1464 and the Commission's indecency regulation. *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2665 ¶ 2 (2006) (*Omnibus Order*). The Commission did not impose any sanction because it concluded that, as in the *Golden Globe Awards* case, broadcast licensees did not have notice at the time of the broadcasts of the Commission's revised policy regarding the airing of isolated expletives.

After a voluntary remand from the Second Circuit (where petitions for review by Fox and other broadcasters had been consolidated), the Commission vacated the relevant portions of the *Omnibus Order* and substituted the order under review in *Fox*. App., *infra*, 35a-

115a. In that order, the Commission reaffirmed its conclusion that Fox's airing of the 2002 and 2003 Billboard Music Awards violated the prohibitions against the broadcast of indecent material. Applying the framework set out in its *Industry Guidance*, the Commission concluded that the expletives aired during the Billboard Music Awards were sexual or excretory references that fell within the subject-matter scope of the Commission's indecency policy. The Commission noted that Ms. Richie's use of the S-Word referred to excrement. *Id.* at 46a-47a. In addition, the Commission explained that the F-Word (used by both Ms. Richie and Cher) inherently "has a sexual connotation even if the word is not used literally" because "the word's power to 'intensify' and offend derives from its implicit sexual meaning." *Id.* at 47a-48a, 90a-91a (footnote omitted).

The Commission further concluded that both broadcasts were "patently offensive." The Commission found that the language used was not only graphic and shocking, particularly in the context of nationally televised awards programs viewed by substantial numbers of children, but also gratuitous. In that regard, the Commission noted that Fox had not argued that the expletives at issue "had any artistic merit or [were] necessary to convey any message." App., *infra*, 48a-49a & n.44, 91a-92a & n.191. The Commission adhered to its prior decision not to impose any sanction on Fox for the broadcasts. See *id.* at 85a-86a, 97a.

c. A divided panel of the court of appeals vacated the Commission's order and remanded the case to the agency for further proceedings. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444 (2d Cir. 2007), rev'd, 129 S. Ct. 1800 (2009). The court concluded that the Commission's change of policy with regard to isolated expletives

was "arbitrary and capricious under the Administrative Procedure Act" because the agency had "failed to articulate a reasoned basis" for the shift. *Id.* at 447. In addition, the court of appeals in dicta made a number of "observations" questioning the constitutionality of the Commission's "'fleeting expletive' regime." *Id.* at 462.

d. This Court reversed. *Fox*, *supra*. Noting that "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission," 129 S. Ct. at 1813, the Court found that "the agency's reasons for expanding the scope of its enforcement activity were entirely rational," *id.* at 1812.

The Court emphasized that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica*." *Fox*, 129 S. Ct. at 1812. The Court rejected the broadcasters' argument that the Commission's contextual analysis gives the agency "unbridled discretion," noting that its decision in *Pacifica* "approved Commission regulation based on a nuisance rationale under which context is all-important." *Id.* at 1815 (internal quotation marks and citation omitted). The Court explained that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Id.* at 1814. The Court found that "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so

as to give conscientious parents a relatively safe haven for their children." *Id.* at 1819. Because "[t]he Second Circuit did not definitively rule on the constitutionality of the Commission's orders," this Court "decline[d] to address the constitutional questions" and remanded the case to the court of appeals for further proceedings. *Ibid.*

e. On remand, the court of appeals did not limit its inquiry to the constitutionality of the Commission's isolated-expletives policy as applied to Fox's broadcasts of the 2002 and 2003 Billboard Music Awards. Instead, the court held that the "FCC's indecency policy is unconstitutional" in its entirety "because it is impermissibly vague." App., *infra*, 18a. The court therefore "grant-[ed] the petition for review and vacate[d]," not just "the FCC's order," but the entire "indecency policy underlying it." *Id.* at 2a.

In finding the Commission's policy unconstitutionally vague, the court of appeals did not understand itself to be constrained by *Pacifica*. The court observed that the decision in *Pacifica* had not expressly addressed vagueness, and it viewed this Court's decision as being "predicated on the FCC's [prior] 'restrained' enforcement policy." App., *infra*, 22a. For the same reason, the court of appeals declined to follow the decisions in the *Action for Children's Television* cases, in which the D.C. Circuit had repeatedly rejected vagueness challenges to the FCC's definition of indecent broadcasting. *Id.* at 22a n.8. "[T]o the extent the *ACT* cases held that a vagueness challenge was precluded by *Pacifica*," the court stated, "we are not bound by the DC Circuit and do not find it persuasive." *Ibid.*

The court of appeals did not question the FCC's determination that the words used in the Billboard Music

Awards shows—variants of the F-Word and the S-Word—are indecent in the context in which they were broadcast. The court understood "the FCC's current policy" to establish a "presumptive prohibition" on the use of the two words unless their use is "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance," or the words are uttered in the course of a "*bona fide* news" program. App., *infra*, 25a-26a (quoting *Omnibus Order*, 21 F.C.C.R. at 2686 ¶ 82). The court of appeals found, however, that the policy is unconstitutionally vague because "broadcasters are left to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview.'" *Id.* at 27a. In reaching that conclusion, the court focused on what it perceived as disparate results reached in a series of FCC decisions addressing complaints about the use of indecent language in broadcast programs. *Id.* at 26a-29a.

The court of appeals recognized that the FCC had adopted a contextual approach to indecency, rather than a rigid rule prohibiting specified words, in part "because [the Commission] recognized that an outright ban on certain words would raise grave First Amendment concerns." App., *infra*, 27a. The court also acknowledged that because "[t]he English language is rife with creative ways of depicting sexual or excretory organs or activities * * * even if the FCC were able to provide a complete list of all such expressions, new offensive and indecent words are invented every day." *Id.* at 24a. In the court's view, however, the "flexibility" provided by the Commission's post-1987 policy "results in a standard that even the FCC cannot articulate or apply consis-

tently." *Id.* at 27a. On that basis, the court of appeals "str[uck] down the FCC's indecency policy" in its entirety. *Id.* at 34a.

6. The *ABC* case arises out of a February 25, 2003, broadcast, at 9:00 p.m. in the Central and Mountain time zones, of an episode of the television show *NYPD Blue* entitled *Nude Awakening*.[1] The show opens with "a woman wearing a robe * * * entering a bathroom, closing the door, and then briefly looking at herself in a mirror hanging above a sink." App., *infra*, 223a. "With her back to the camera," the woman "removes her robe, thereby revealing the side of one of her breasts and a full view of her back." *Ibid.* "The camera shot includes a full view of her buttocks and her upper legs as she leans across the sink to hang up her robe." *Ibid.* As she walks from the mirror to the shower, "a small portion of the side of one of her breasts is visible," and "her buttocks are visible from the side." *Ibid.*

The camera then shifts to show a young boy getting out of bed and walking toward the bathroom, at which point "[t]he camera cuts back to the woman, who is now shown standing naked in front of the shower, her back to the camera." App., *infra*, 223a-224a. The camera first shows the woman "naked from the back, from the top of her head to her waist." *Id.* at 224a. "[T]he camera then pans down to a shot of her buttocks, lingers for a moment, and then pans up her back." *Ibid.* Next, the boy is shown opening the bathroom door. *Ibid.* As he does so, the woman "quickly turns to face" him. *Ibid.* "The camera initially focuses on the woman's face but then cuts to a shot taken from behind and through her

[1] A recording of this episode, which was part of the record before the court of appeals, has been filed with the Clerk.

legs, which serve to frame the boy's face as he looks at her." *Ibid.*

The camera immediately shifts to "a front view of the woman's upper torso," although a "full view of her breasts is obscured * * * by a silhouette of the boy's head and ears." App., *infra*, 224a. "After the boy backs out of the bathroom and shuts the door," the woman is shown "facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area." *Ibid.* "The scene ends with the boy's voice, heard through the closed door, saying 'sorry,'" to which "the woman while looking embarrassed, responds, 'It's okay. No problem.'" *Ibid.*

a. After issuing a letter of inquiry and a notice of apparent liability, the FCC in 2008 imposed an indecency forfeiture of $27,500 on each of several ABC-network-owned or -affiliated television stations. App., *infra*, 126a-214a. Applying the framework set out in its *Industry Guidance*, including the longstanding agency definition of indecency that this Court approved in *Pacifica*, the Commission first concluded that the depiction of an adult woman's naked buttocks in the episode constituted a depiction of sexual or excretory organs and thus fell within the subject-matter scope of the Commission's indecency policy. *Id.* at 132a-137a. The Commission then determined that "in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 138a.

In explaining its determination that the relevant broadcast material was patently offensive, the Commission observed that the episode contained a "close range," "fully visible" view of the actress's unclothed buttocks that was "sufficiently graphic and explicit to support an

indecency finding." *Id.* at 140a. The Commission further explained that camera shots of the woman's buttocks were "repeated" within the scene, which "focuses on her nudity." *Id.* at 142a. Finally, the Commission determined that the scene was "pandering, titillating, and shocking." *Id.* at 143a. The FCC explained that the scene placed the audience in the "voyeuristic position" of observing a naked woman preparing to shower, and that the manner in which the scene was shot "highlights the salacious aspect of the scene." *Id.* at 144a. The Commission also found that "subsequent camera shots of the boy's shocked face from between the woman's legs, and of her naked, partially-obscured upper torso from behind his head" contributed to the scene's "titillating and shocking nature." *Id.* at 144a. The Commission accordingly concluded that the *NYPD Blue* episode was "actionably indecent." *Id.* at 149a.

b. ABC and its affiliates sought review of the *Forfeiture Order* in the Second Circuit. On January 4, 2011, after denying the government's rehearing petition in *Fox*, the court of appeals issued a summary order in *ABC* vacating the Commission's order imposing the forfeitures. The court concluded that "there is no significant distinction between this case and *Fox*" because "[a]lthough this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found 'impermissibly vague.'" App., *infra*, 124a (citation omitted). As in *Fox*, the court of appeals did not address the question whether, on the facts of the case, the broadcasters had constitutionally sufficient notice that the relevant *NYPD Blue* episode was indecent. Rather, the court of appeals viewed the *ABC* case as controlled by the court's prior conclusion in *Fox* that the Commission's indecency policy is facially

unconstitutional. See *ibid.* ("*Fox*'s determination that the FCC's indecency policy is unconstitutionally vague binds this panel."). The court accordingly vacated the *Forfeiture Order* without addressing any of the other administrative-law or constitutional challenges raised by the *ABC* petitioners. *Id.* at 124a-125a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in "strik[ing] down" the Commission's "indecency policy" in *Fox* and then in applying that decision in *ABC*. App., *infra*, 34a, 124a-125a. Review of both decisions is warranted because they conflict with decisions of this Court and the D.C. Circuit, and because they effectively preclude the FCC from performing its statutory obligation to enforce prohibitions on broadcast indecency.

The court of appeals' decisions conflict with *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), in which this Court recognized that context is an "all-important" component of an effective and constitutional indecency regime. *Id.* at 750. While this Court held in *Pacifica* that the FCC's consideration of context was critical to the constitutionality of the indecency enforcement regime, the court of appeals found in these cases that the very same feature rendered the Commission's policy unconstitutionally vague. The Second Circuit's rulings also conflict with the D.C. Circuit's decisions in the *Action for Children's Television* cases, which held that *Pacifica* forecloses a vagueness challenge to the Commission's context-based indecency policy.

In addition, the court of appeals' approach is inconsistent with *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (*HLP*). That decision requires a court to focus its vagueness inquiry on the facts of the

case at hand, rather than on other applications not before the court. Notwithstanding that directive, the court of appeals failed entirely to ask whether Fox or ABC lacked adequate notice that the particular broadcasts at issue here would be considered indecent, instead examining other FCC orders involving different broadcasts.

Finally, the court's decisions—which involve both indecent expletives in live programming (*Fox*) and images of adult nudity in a scripted show (*ABC*)—preclude the FCC from carrying out its statutory responsibility to ensure that broadcasters honor their longstanding public interest obligation not to air indecent material. To comply with the court's vagueness determination, the Commission apparently would be required to sacrifice the "flexibility" that the court of appeals found unconstitutional, App., *infra*, 25a, and instead attempt to implement hard-and-fast rules prohibiting certain words and images with no meaningful consideration of context. Such a policy would be easily circumvented, however, and it would raise serious First Amendment problems of its own. If left to stand, the court of appeals' decisions would leave the FCC with no effective means to implement its longstanding statutory authority over indecent broadcasting.

I. THE COURT OF APPEALS' RULINGS CONFLICT WITH DECISIONS OF THIS COURT AND THE D.C. CIRCUIT

A. In upholding the FCC's determination that the Carlin monologue was indecent, this Court in *Pacifica* recognized that the Commission's order "rested entirely on a nuisance rationale under which context is all-important." 438 U.S. at 750. Indeed, as the plurality portion of the opinion stressed, "indecency is largely a function of context" and "cannot be adequately judged in the ab-

stract." *Id.* at 742. Because this understanding of indecency "requires consideration of a host of variables," the Court explained, "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy," or "a prime-time recitation of Geoffrey Chaucer's Miller's Tale," need not necessarily be treated like the Carlin monologue even if "an occasional expletive" were broadcast. *Id.* at 750 & n.29; see *id.* at 747 (plurality opinion of Stevens, J.) ("the constitutional protection accorded to a communication containing * * * patently offensive sexual and excretory language need not be the same in every context"). In *Fox*, this Court affirmed that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica*." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009); see *id.* at 1815 ("we have previously approved Commission regulation based 'on a nuisance rationale under which context is all-important'") (quoting *Pacifica*, 438 U.S. at 750).

The Court in *Pacifica* did not suggest that the Commission's context-based approach rendered the FCC's broadcast indecency policy unconstitutionally vague. Nor did the Court suggest that the Commission's definition of indecency—which then, as now, applied to "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," 438 U.S. at 732 (citing *In re Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C. 2d 94, 98 (1975))—is unconstitutionally imprecise. The Court's statement that it found "no basis for disagreeing with the Commission's

conclusion that indecent language was used in [the] broadcast," *id.* at 741, further indicates that the Commission's standard did not "fail[] to provide" the Court with meaningful guidance on "what [was] prohibited," *United States* v. *Williams*, 553 U.S. 285, 304 (2008).

The Second Circuit concluded in *Fox* that *Pacifica* was not controlling because it thought *Pacifica* was predicated on a "'restrained' enforcement policy," which the court of appeals understood the FCC to have since abandoned. App., *infra*, 22a. But this Court has "never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815. In any event, the court of appeals' vagueness analysis is largely untethered to the relevant change in the Commission's indecency policy. The Commission's determination that "isolated" or "fleeting" expletives may be actionably indecent did not render the regulatory regime less determinate than it had been previously. Rather, the court of appeals held that the Commission's broadcast indecency policy is unconstitutionally vague because it gives the Commission too much "flexibility," and results in "a standard that * * * the FCC cannot articulate or apply consistently." App., *infra*, 27a. What the court below considered undue flexibility, however, is simply analysis of context—a longstanding feature of FCC indecency regulation that the Court in *Pacifica* viewed as a *virtue* of the Commission's approach.

Although the court of appeals faulted the Commission for not having "discernible standards by which individual contexts are judged," App., *infra*, 30a, the Commission's *Industry Guidance* in fact provides such standards. And even before the FCC issued that guidance, the D.C. Circuit noted that unless "*only* the seven dirty

words are properly designated indecent[,] * * * some more expansive definition must be attempted," and that "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338 (1991) (R.B. Ginsburg, J.). The court of appeals in this case did not identify any "tighter" definition of indecency by which the Commission could have provided clearer guidance to broadcasters while preserving consideration of the overall context in which particular words and images appear.

B. The court of appeals' decisions also conflict with the D.C. Circuit's decisions in the *Action for Children's Television* cases. As the D.C. Circuit explained in *ACT I*, "[t]he generic definition of indecency * * * employed by the FCC" after 1987 "is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case." 852 F.2d at 1338. The D.C. Circuit "infer[red] from [*Pacifica*'s] holding that the Court did not regard the term indecent as so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 1339 (internal quotation marks and citation omitted); see *ibid.* ("acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge" is "implicit in *Pacifica*"); *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [FCC's] definition"); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc) (dismissing vagueness challenges as "meritless"), cert. denied, 516 U.S. 1043 (1996).

The court below distinguished the D.C. Circuit's decisions on the ground that the court in *ACT I* "relied specifically on the FCC's restrained policy in reaching its decision." App., *infra*, 22a n.8. But the statement in *ACT I* to which the Second Circuit alluded referred only to the Commission's (still existing) policy of "giv[ing] weight to reasonable licensee judgments when deciding whether to impose sanctions." 852 F.2d at 1340 n.14. That statement was made only to support the D.C. Circuit's conclusion that the Commission's generic indecency definition "is not vulnerable to the charge that it is substantially overbroad," *id.* at 1340; it did not qualify the D.C. Circuit's vagueness analysis, which rested entirely on its understanding of *Pacifica*'s holding, see *id.* at 1338-1339. The FCC decisions following the *Action for Children's Television* cases—including the 2001 *Industry Guidance*—have further clarified the manner in which the Commission will apply its longstanding definition of indecency. The intervening FCC decisions on which the court of appeals relied therefore provide no basis for rejecting the D.C. Circuit's repeated findings that the Commission's indecency policy is not unconstitutionally vague.

The court of appeals also stated that "to the extent the *ACT* cases held that a vagueness challenge was precluded by *Pacifica*, we are not bound by the DC Circuit and do not find it persuasive." App., *infra*, 22a n.8. Review is warranted to resolve that conflict in the courts of appeals.

C. Finally, the court of appeals' opinion in *Fox* (which the court applied in *ABC*) conflicts with this

Court's decision in *HLP*, *supra*.[2] The Court in *HLP* made clear that courts must evaluate vagueness claims based on "the particular facts at issue." 130 S. Ct. at 2719. That ruling rests on the well-settled proposition that "'[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Ibid.* (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)); see *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 58-61 (1976) (declining to reach facial vagueness challenges to ordinances where the ordinances "unquestionably" applied to the litigants' own conduct); see *Pacifica*, 438 U.S. at 735 (focusing review on ruling that Carlin monologue was indecent "as broadcast"). The Court in *HLP* explained that this "rule makes no exception for conduct in the form of speech." 130 S. Ct. at 2719.

Under *HLP*, the court of appeals should have addressed the constitutionality of the Commission's indecency policy as applied to the facts of the actual broadcasts before it. If the court had done so, it would have rejected the vagueness challenges even if it thought the FCC's policy might be vague as applied to other broadcasts. Fox could not reasonably have believed (and has never claimed) that the gratuitous utterance of the F-Word and the S-Word comport with the community standards for the relevant broadcast medium, see *Pacifica*, 438 U.S. at 751 (noting Carlin's observation that the words are among those "you couldn't say on the public * * * airwaves"); see also *In re WUHY-FM*,

[2] The government brought *HLP* to the court of appeals' attention in a supplemental filing in the *Fox* case. In a footnote, the court of appeals in *Fox* dismissed the decision as "inapposite" on the ground that it arose in a "different procedural posture." App., *infra*, 30a n.9.

Eastern Educ. Radio, 24 F.C.C. 2d 408, 415 ¶ 17 (1970) (fining radio station for airing gratuitous utterances of the F-Word and S-Word in interview). Indeed, the network edited out the F- and S-Words when the awards shows were broadcast on tape delay in later time zones. App., *infra*, 61a, 94a.

The court of appeals in *Fox*, however, did not determine whether the Commission's indecency policy was unconstitutionally vague as applied to the facts of that case (*i.e.*, to the airing of those words during live awards shows with millions of children in the audience). Rather, to determine whether the Commission's policy provides adequate guidance "by which broadcasters can accurately predict" indecency determinations "in the future," App., *infra*, 22a, 24a, the court examined Commission indecency determinations involving different words and phrases, *id.* at 23a-24a ("pissed off," "dick" and "dickhead"), and starkly different contexts, *id.* at 26a (broadcast of the movie "Saving Private Ryan"), *id.* at 29a (documentary on "The Blues"). And by "strik[ing] down the FCC's indecency policy" in its entirety, *id.* at 34a, the court invalidated its application to even the most graphic broadcasts, see, *e.g.*, *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8004 ¶ 13 (2001) (graphic discussion of oral sex); *id.* at 8009 ¶ 19 (explicit joke about rape of a baby); *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 934 (1987) (extended narrative regarding anal sex).

The court of appeals in *ABC* likewise did not address whether the Commission's indecency policy was vague as applied to ABC's broadcast of scripted adult nudity. Instead, the court vacated the indecency sanction

against ABC based solely on its antecedent holding in *Fox* that the Commission's policy was facially vague. App., *infra*, 120a. Thus, under the Second Circuit's decisions, a broadcaster can evade liability for its indecent broadcasts even when the material at issue is "plainly prohibited" by the FCC's indecency policy (*HLP*, 130 S. Ct. at 2721), based solely on a claim that the policy may be vague "as applied to the conduct of others," *id.* at 2709 (internal quotation marks and citation omitted). The court of appeals' failure to adhere to the vagueness principles set forth in *HLP* warrants this Court's review.

II. THE COMMISSION'S INDECENCY POLICY IS NOT UNCONSTITUTIONALLY VAGUE

A statute or rule is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. Because "we can never expect mathematical certainty from our language," *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972), "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Williams*, 553 U.S. at 304 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)). Moreover, "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." *Smith* v. *Goguen*, 415 U.S. 566, 581 (1974); see *Pacifica Found.* v. *FCC*, 556 F.2d 9, 33 (D.C. Cir. 1977) (Leventhal, J., dissenting) ("[a] concept like 'indecent' is not verifiable as a concept of hard science"), rev'd, 438 U.S. 726 (1978).

By prohibiting the broadcast of "obscene, indecent, or profane language," 18 U.S.C. 1464, and by directing the FCC to "promulgate regulations to prohibit the broadcasting of indecent programming" during specified hours of the day, Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16, 106 Stat. 954, Congress recognized that a wide variety of material, not easily specified in advance, could transgress the reasonable standards of behavior applicable to broadcasters. The Commission clarified its understanding of the statutory terms when, in a definition that this Court approved in *Pacifica*, it identified indecency as material that describes "in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." See *Citizen's Complaint*, 56 F.C.C. 2d 98 ¶ 11.

In the 33 years since *Pacifica* was decided, the Commission has further elaborated on its enforcement policy by issuing numerous decisions applying its indecency analysis to specific factual situations. See *Industry Guidance*, 16 F.C.C.R. at 8004-8015 (collecting and summarizing decisions); see also, *e.g.*, *In re Complaints By Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1931 (2005) (denying 15 separate indecency complaints). The agency's continued explanation and application of its indecency standards serve to further "narrow potentially vague or arbitrary interpretations" of its rules and of the statute. See *Hoffman Estates*, 455 U.S. at 504; see also *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 575 (1973) (rejecting vagueness challenge in light of "the longstanding interpretations of the statute by the agency charged with its interpretation and en-

forcement"). The Commission has provided further protection against unfair surprise by declining to sanction broadcasters in cases (such as *Fox*) where it was not clear at the time of the broadcast that the FCC regarded the pertinent material as indecent. *E.g.*, App., *infra*, 95a. And broadcasters that remain unsure whether particular material is covered can escape any risk of sanction by airing the material during the safe harbor after 10 p.m. See 47 C.F.R. 73.3999(b). These balanced rules have operated effectively for years to protect minors while providing adequate guidance to broadcasters.

Even apart from its error in going beyond the facts of *Fox* and *ABC*, the court of appeals had no sound basis for concluding that the Commission's indecency policy, as embodied in its 2001 *Industry Guidance*, failed to give "person[s] of ordinary intelligence" in the highly sophisticated broadcast industry "fair notice of what is prohibited." *Williams*, 553 U.S. at 304. Although the court acknowledged that "[i]t is the language of the rule * * * that determines whether a law or regulation is impermissibly vague" (App., *infra*, 21a), it did not focus on the guidance provided by the Commission's indecency definition. Instead, the court relied on what it considered to be inconsistent outcomes in a handful of indecency orders to conclude that "broadcasters have no way of knowing what the FCC will find offensive." App., *infra*, 34a; see *id.* at 23a-24a (different outcomes with regard to the use of different expletives gives broadcasters insufficient notice of how the Commission will apply its factors); *id.* at 26a ("little rhyme or reason" to Commission ruling that isolated expletive in Golden Globe

Awards was indecent while repeated use of F-Word and S-Word in "Saving Private Ryan" was not).[3]

The court of appeals ignored the settled principle that "the mere fact that close cases can be envisioned" does not render a statute (or an agency policy) unconstitutionally vague because "[c]lose cases can be imagined under virtually any statute." *Williams*, 553 U.S. at 305-306. Thus, an agency enforcement policy cannot be "automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within [its] language." *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). At bottom, the court of appeals' vagueness analysis reflects a fundamental rejection of the contextual approach to indecency that the Court upheld in *Pacifica*, under which different circumstances can (unsurprisingly) produce different outcomes. Taking account of context does not establish "a standardless regime of unbridled discre-

[3] In concluding that the FCC's context-driven, case-by-case approach to indecency "is not arbitrary or capricious," this Court in *Fox* specifically noted that contextual considerations supported the Commission's different treatment of expletives in the movie "Saving Private Ryan." 129 S. Ct. at 1814. The Court observed in particular that "[t]he frightening suspense and the graphic violence in the movie could well dissuade the most vulnerable from watching and would put parents on notice of potentially objectionable material." *Ibid.* (citation omitted). The Court concluded that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Ibid.* Yet, even after this Court in *Fox* unequivocally rejected the broadcasters' invocation of "Saving Private Ryan" as "supposed evidence of the Commission's inconsistency," *ibid.*, the court of appeals on remand adhered to its prior view that the FCC's treatment of that film could not be reconciled with FCC decisions concerning other broadcasts. See App., *infra*, 26a-27a.

tion." *Fox*, 129 S. Ct. at 1815. Nor does it otherwise render the Commission's indecency enforcement policy unconstitutionally vague.

III. THE ADVERSE CONSEQUENCES OF THE COURT OF APPEALS' DECISIONS ARE SWEEPING AND UNAVOIDABLE

In "strik[ing] down the FCC's indecency policy," App., *infra*, 34a, and in later finding that its holding in *Fox* eviscerates all subsequently-reviewed indecency determinations, *id.* at 124a, the court of appeals has overturned the basic framework under which the Commission implements the longstanding statutory and regulatory prohibitions on indecent broadcasting. Indeed, as the decision in *ABC* shows, the Second Circuit's vagueness holding is not confined to particular uses of offensive language, but extends to every other context, including scripted displays of adult nudity. The court of appeals has effectively suspended the Commission's ability to fulfill its statutory indecency enforcement responsibilities unless and until the agency can adopt a new policy that surmounts the court of appeals' vagueness rulings. Accordingly, broadcasters may well believe that they have been freed of the public-interest obligation not to air indecent programming that they assumed when they were originally "granted the free and exclusive use of a limited and valuable part of the public domain." *Fox*, 129 S. Ct. at 1806 (quoting *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981)).

In the concluding paragraph of its opinion in *Fox*, the Second Circuit purported to limit the scope of its decision by stating: "We do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC's current policy fails constitutional scrutiny."

App., *infra*, 34a. But while the court of appeals condemned the purported absence of "discernible standards" in the Commission's current policy, *id.* at 30a, the court itself identified no alternative definition of actionable indecency that would provide the requisite clarity without creating countervailing practical and constitutional difficulties. See *ACT I*, 852 F.2d at 1338 (upholding FCC's generic indecency definition and observing that "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested").

Addressing the court of appeals' concerns by establishing a list of prohibited words is not a realistic option. As the Commission explained in 1987 when it abandoned that approach and adopted its contextual analysis, "[t]here is no way to construct a definitive list that would be both comprehensive and not over-inclusive in the abstract, without reference to the specific context." *Infinity Order*, 3 F.C.C.R. at 932 ¶ 14. The court of appeals itself recognized that while such an approach would have "the advantage of providing broadcasters with a clear list of words that [are] prohibited," App., *infra*, 24a, it would "mean[] that some indecent speech that did not employ [those] words [would] slip[] through the cracks," *ibid.*

As the court of appeals acknowledged, moreover, "an outright ban on certain words would raise grave First Amendment concerns." App., *infra*, 27a. Such an inflexible prohibition, even if limited to the most graphic expletives or images, would preclude the airing of valuable broadcast material. See *In re Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, 4513 ¶ 16 (2005) (concluding that broad-

cast of film "Saving Private Ryan," while containing numerous expletives, was not patently offensive in light of its "overall context"); *In re WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1840, 1842 ¶¶ 9, 13 (2000) (concluding that broadcast of film "Schindler's List" containing "adult frontal nudity" was not patently offensive "based on the full context of its presentation"). A mechanical prohibition of specified broadcast material would also be inconsistent with the context-based approach this Court upheld in *Pacifica*, see 438 U.S. at 750, and such an approach would be difficult (if not impossible) to apply to indecent images.

In sum, the court of appeals' decisions preclude the Commission from effectively implementing statutory restrictions on broadcast indecency that the agency has enforced since its creation in 1934. That extraordinary hobbling of the Commission's enforcement efforts warrants this Court's review.[4]

[4] The government is filing a single petition for a writ of certiorari because the court of appeals' judgments in *Fox* and *ABC* "involve identical or closely related questions." Sup. Ct. R. 12.4. Indeed, the court of appeals concluded that its disposition of *ABC* was controlled by its decision in *Fox* on the ground that "there [was] no significant distinction" between the two cases. App., *infra*, 124a. While the Court could appropriately grant certiorari only in *Fox* (the first question presented) and hold *ABC* (the second question presented), we believe the better course is to grant review of both judgments. The two cases present distinct contexts: *Fox* involves expletives in live programming, and *ABC* involves images of adult nudity in a scripted show. Simultaneous review of both judgments would thus allow the Court to evaluate how the FCC's indecency rules apply in different settings. This would be especially warranted given the court of appeals' decision to "strike down" the Commission's "indecency policy" in its entirety, *id.* at 34a, and with respect to all its applications, *id.* at 124a-125a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

AUSTIN C. SCHLICK
General Counsel
PETER KARANJIA
Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
NANDAN M. JOSHI
Counsel
Federal Communications Commission

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JOSEPH R. PALMORE
Assistant to the Solicitor General
THOMAS M. BONDY
ANNE MURPHY
Attorneys

APRIL 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag

FOX TELEVISION STATIONS, INC., CBS BROADCASTING INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION, INTERVENORS

Argued: Jan. 13, 2010
Decided: July 13, 2010

LEVAL, POOLER, and HALL, *Circuit Judges.*

POOLER, Circuit Judge:

This petition for review comes before us on remand from the Supreme Court. Previously we held, with Judge Leval dissenting, that the indecency policy of the

Federal Communications Commission ("FCC" or "Commission") was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007). The Supreme Court reversed, upholding the policy under the APA and remanding for consideration of petitioners' constitutional arguments. *See Fox Television Stations, Inc. v. FCC*, 129 S. Ct. 1800, 1819 (2009) (Scalia, J.). We now hold that the FCC's policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here. Thus, we grant the petition for review and vacate the FCC's order and the indecency policy underlying it.[1]

BACKGROUND

Section 1464 of Title 18 of United States Code provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." In 1960, Congress authorized the FCC to impose civil forfeitures for violations of Section 1464. *See* 47 U.S.C. § 503(b)(1)(D). It was not until 1975, however, that the FCC first exercised its authority to regulate speech it deemed indecent but not obscene. The speech at issue was comedian George Carlin's "Filthy Words" monologue, a 12-minute string of expletives broadcast on the radio at 2:00 in the afternoon.

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[1] We address only the petition for review filed in Docket No. 06-5358, te other two petitions having been previously dismissed as moot by this Court. *Fox*, 489 F.3d at 447 n.2.

The FCC brought forfeiture proceedings against the Pacifica Foundation, the broadcaster that had aired the Carlin monologue. *Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y, N.Y.*, 56 F.C.C. 2d 94 (1975). In finding that Pacifica had violated Section 1464, the Commission defined "indecent" speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at ¶ 11. Pacifica petitioned for review to the D.C. Circuit, which declared the FCC's indecency regime invalid. *See Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977). In finding the FCC's order both vague and overbroad, the court pointed out that the Commission's definition of indecent speech would prohibit "the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible." *Id.* at 14. Such a result, the court concluded, amounted to unconstitutional censorship. *Id.* at 18.

In a plurality opinion authored by Justice Stevens, the Supreme Court reversed. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The Court limited its review to the question of whether the FCC could impose a civil forfeiture for the Carlin monologue and declined to address Pacifica's argument that the regulation was overbroad and would chill protected speech. *Id.* at 734-35, 743 ("Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a

last resort.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973))). In limiting its review, the Court stressed the "specific factual context" of the Carlin monologue, *id.* at 742, focusing in particular on Carlin's deliberate and repetitive use of expletives to describe sexual and excretory activities.

The Court then went on to hold that the FCC could, at least in the situation before it, restrict indecent speech in the broadcast context that did not meet the legal definition of obscenity. *Id.* at 744 (concluding that "if the government has any such power [to restrict indecent speech], this was an appropriate occasion for its exercise"). Resting on a nuisance rationale, the Court first noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection" because of its "uniquely pervasive presence in the lives of all Americans." *Id.* at 748. Moreover, the nature of broadcast television—as opposed to printed materials—made it "uniquely accessible to children, even those too young to read." *Id.* at 749. The Court, however, "emphasize[d] the narrowness of [its] holding." *Id.* at 750. "[N]uisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id.* at 750-51 (internal quotation marks omitted).

Justices Powell and Blackmun, who concurred in a separate opinion, also made clear that the FCC's regulatory authority was limited, stating that the Court's holding did not give the FCC "an unrestricted license to decide what speech, protected in other media, may be

banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Id.* at 759-60 (Powell, *J.*, concurring). Nor, they explained, did the holding "speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here." *Id.* at 760-61. Finally, they took the FCC at its word that it would "proceed cautiously," which they reasoned would minimize any chilling effect that might otherwise result. *Id.* at 761 n.4.

In the years after *Pacifica*, the FCC did indeed pursue a restrained enforcement policy, taking the position that its enforcement powers were limited to the seven specific words in the Carlin monologue. *See In re Application of WGBH Educ. Found.*, 69 F.C.C. 2d 1250, at ¶ 10 (1978); *Infinity Broadcasting Corp., et al.*, 3 F.C.C. Rcd. 930, at ¶ 5 (1987) ("*Infinity Order*"). No enforcement actions were brought between 1978 and 1987. *Infinity Order*, 3 F.C.C. Rcd. 930, at ¶ 4. Then, in 1987, the FCC abandoned its focus on specific words, concluding that "although enforcement was clearly easier under the standard, it could lead to anomalous results that could not be justified." *Id.* at ¶ 5. The FCC reasoned that under the prior standard, patently offensive material was permissible as long as it avoided certain words. This, the Commission concluded, "made neither legal nor policy sense." *Id.* The Commission instead decided to utilize the definition it had used in *Pacifica*, adopting a contextual approach to indecent speech.

Despite its move to a more flexible standard, the FCC continued to exercise restraint. In particular, it consistently held that a single, non-literal use of an ex-

pletive was not actionably indecent. *See, e.g., In re Application of WGBH Educ. Found*, 69 F.C.C.2d 1250, at ¶ 10 n.6. (noting that the single use of an expletive in a program that aired at 5:30pm "should not call for us to act under the holding of *Pacifica*"); *In re Regents of the Univ. of Cal.*, 2 F.C.C. Rcd. 2703, at ¶ 3 (1987) ("Speech that is indecent must involve more than an isolated use of an offensive word."); *L.M. Communications of S.C., Inc.*, 7 F.C.C. Rcd. 1595, 1595 (1992) (finding the single utterance of the F-word not indecent because it was a "fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction"); *In re Application of Lincoln Dweller, Renewal of the License of Stations KPRL(AM) and KDDB(FM)*, 8 F.C.C. Rcd. 2582, 2585 (1993) (The "use of a single expletive" did not warrant further review "in light of the isolated and accidental nature of the broadcast.").

In 2001, in an attempt to "provide guidance to the broadcast industry regarding . . . [its] enforcement policies with respect to broadcast indecency," the FCC issued a policy statement in which it set forth its indecency standard in more detail. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C. Rcd 7999, at ¶ 1 (2001) ("Industry Guidance"). In *Industry Guidance*, the FCC explained that an indecency finding involved the following two determinations: (1) whether the material "describe[s] or depict[s] sexual or excretory organs or activities"; and (2) whether the broadcast is "patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at ¶¶ 7-8 (emphasis omitted). The FCC further explained that it considered the following three factors in determining whether a broadcast is

patently offensive: (1) "the explicitness or graphic nature of the description or depiction"; (2) "whether the material dwells on or repeats at length" the description or depiction; and (3) "whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value." *Id.* at ¶ 10 (emphasis omitted). The *Industry Guidance* reiterated that under the second prong of the patently offensive test, "fleeting and isolated" expletives were not actionably indecent. *Id.* at ¶ 18.

In 2004, however, the FCC's policy on indecency changed. During the 2003 Golden Globe Awards, U2 band member Bono exclaimed, upon receiving an award, "this is really, really, fucking brilliant. Really, really, great." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C. Rcd. 4975, at ¶ 3 n.4 (2004) ("*Golden Globes Order*"). In response to complaints filed after the incident, the FCC declared, for the first time, that a single, nonliteral use of an expletive (a so-called "fleeting expletive") could be actionably indecent.[2]

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[2] The FCC's increased enforcement efforts—as well as Congress's decision to increase the maximum fines—were in large part caused by the broadcast of the 2004 Super Bowl, during which Justin Timberlake exposed Janet Jackson's breast for a fraction of a second during their halftime show, an event that came to be known as "Nipplegate." Frank Ahrens, *The Price for On-Air Indecency Goes Up*, Wash. Post (June 8, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700287.html. The FCC imposed a $550,000 fine, which was overturned by the Third Circuit. *See CBS Corp. v. FCC*, 535 F.3d 167, 209 (3d Cir. 2008). After the Supreme Court issued its decision in *Fox*, it vacated the decision and remanded to the Third Circuit for reconsideration in light of *Fox*. *See FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009). The Third Circuit has yet to issue a new decision.

Finding that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language," *id.* at ¶ 9, and therefore "inherently has a sexual connotation," *id.* at ¶ 8, the FCC concluded that the fleeting and isolated use of the word was irrelevant and overruled all prior decisions in which fleeting use of an expletive was held *per se* not indecent, *id.* at ¶¶ 8-12. The FCC also found that the broadcast was "profane" within the meaning of Section 1464, abandoning its previous interpretation of the term to mean blasphemy. *Id.* at ¶¶ 13-14.

At the same time that the FCC expanded its enforcement efforts to include even fleeting expletives, the FCC also began issuing record fines for indecency violations.[3] While the Commission had previously interpreted the maximum fines in the statute as applying on a per program basis, it began treating *each* licensee's broadcast of the same program as a separate violation, thereby multiplying the maximum fine the FCC could order for each instance of indecent speech. In addition, Congress amended Section 503(b)(2)(c)(ii) to increase the maximum fine permitted by a factor of 10—from $32,500 to $325,000—meaning that the fine for a single expletive uttered during a broadcast could easily run into the tens of millions of dollars. *See* 47 U.S.C. § 503(b)(2)(c)(iii).

NBC Universal, Inc. ("NBC"), along with numerous other parties, filed petitions for reconsideration of the *Golden Globes Order* before the FCC, raising statutory and constitutional challenges to the new policy. While the petitions for reconsideration were pending, the FCC

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[3] In 2003, the FCC imposed $440,000 in fines. In 2004, it imposed a record $8 million in fines. *See* Former FCC Commissioners Br. at 10 n.6.

applied the *Golden Globes Order* policy in *In Re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C. Rcd. 2664 (2006) ("*Omnibus Order*"), which the Commission stated was intended to "provide substantial guidance to broadcasters and the public" about what was considered indecent under the new policy. *Id.* at ¶ 2. In the *Omnibus Order* (which dealt with many more programs than are at issue in the present case), the Commission found four programs—the 2002 Billboard Music Awards, the 2003 Billboard Music Awards, various episodes of ABC's NYPD Blue, and CBS's The Early Show—indecent and profane under the Golden Globes standard.

All four programs involved what could be characterized as fleeting expletives. For instance, during the 2002 Billboard Music Awards, Cher, in an unscripted moment from her acceptance speech, stated: "People have been telling me I'm on the way out every year, right? So fuck 'em." *Id.* at ¶ 101. Similarly, during the 2003 Billboard Music Awards, Nicole Ritchie—on stage to present an award with Paris Hilton—made the following unscripted remark: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* at ¶ 112 n.164. Episodes of NYPD Blue were found indecent based on several instances of the word "bullshit," *id.* at ¶ 125, while the CBS's The Early Show was found indecent on the basis of a guest's use of the word "bullshitter" to describe a fellow contestant on the reality TV show, Survivor: Vanuatu, *id.* at ¶ 137.

In finding these programs indecent and profane, the FCC reaffirmed its decision in the Golden Globes Order that any use of the word "fuck" was presumptively inde-

cent and profane, *id.* at ¶¶ 102, 107, further concluding that any use of the word "shit" was also presumptively indecent and profane, *id.* at ¶¶ 138, 143. It also held that the four broadcasts in question were "patently offensive" because the material was explicit, shocking, and gratuitous, notwithstanding the fact that the expletives were fleeting and isolated. *Id.* ¶¶ 106, 120, 131, 141.

Fox Television Stations, Inc. ("Fox"), CBS Broadcasting Inc. ("CBS"), and ABC Inc. ("ABC"), as well as several network affiliates, filed petitions for review of the Omnibus Order.[4] The FCC moved for a voluntary remand, which we granted, so that it could have the opportunity to address petitioners' arguments and could ensure that all licensees had a full opportunity to be heard before the FCC issued a final decision. After soliciting public comments, the FCC issued a second order on November 6, 2006. *See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C. Rcd. 13299 (2006) ("Remand Order"). In the Remand Order, the FCC reaffirmed its finding that the 2002 and 2003 Billboard Music Awards were indecent and profane. However, the FCC reversed its finding with respect to The Early Show and dismissed the complaint against NYPD Blue on procedural grounds.[5]

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[4] ABC originally filed a petition for review in the D.C. Circuit, which was then transferred to this Court and consolidated with the Fox/CBS petitions for review.

[5] The Commission dismissed the complaints against NYPD Blue because the only person who complained of the material resided in the Eastern time zone, where NYPD Blue aired during the "safe harbor" period after 10pm. *Id.* at ¶ 75.

In the Remand Order, the FCC rejected the petitioners' argument that non-literal uses of expletives were not indecent, reasoning that "any strict dichotomy between expletives and descriptions or depictions of sexual or excretory functions is artificial and does not make sense in light of the fact that an expletive's power to offend derives from its sexual or excretory meaning." *Id.* at ¶ 23 (internal quotation marks omitted). However, the Commission did "not take the position that any occurrence of an expletive is indecent or profane under its rules," allowing that expletives that were "integral" to an artistic work or occurring during a "*bona fide* news interview" might not run afoul of the indecency standard. *Id.* at ¶ 70 (emphasis added). As such, it reversed its previous decision concerning the CBS's The Early Show because the utterance of the word "bullshitter" took place during a *bona fide* news interview. The Commission made clear, however, that "there is no outright news exemption from our indecency rules." *Id.* at ¶ 71.

Petitioners and intervenors,[6] which collectively represented all the major broadcast networks as well as local affiliates affected by the FCC's indecency policy (hereinafter, the "Networks"), returned to this Court for review of the Remand Order, making a variety of administrative, statutory, and constitutional arguments. In a 2-1 decision (with Judge Leval in dissent), we held that the FCC's indecency policy was arbitrary and capricious under the APA. *Fox*, 489 F.3d at 447. We reached this

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[6] Intervenors included NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates, CBS Television Networks Affiliation, and ABC Television Affiliates Association. On remand from the Supreme Court, the Center for Creative Voices and Future of Music Coalition, which represents the artistic community, filed a motion to intervene, which we granted.

decision because we believed that the FCC had failed to adequately explain why it had changed its nearly-30-year policy on fleeting expletives. *Id.* at 58. Moreover, we noted that the FCC's justification for the policy—that children could be armed by hearing even one fleeting expletive (the so-called "first blow" theory)—bore "no national connection to the Commission's actual policy," because the FCC had not instituted a blanket ban on expletives. *Id.*

Because we struck down the indecency policy on APA grounds, we declined to reach the constitutional issues in the case. We noted, however, that we were "skeptical that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." *Id.* at 462. We expressed sympathy for "the Networks' contention that the FCC's indecency test [wa]s undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." *Id.* at 463. We were also troubled that the FCC's policy appeared to permit it to "sanction speech based on its subjective view of the merit of that speech." *Id.* at 464. However, because it was unnecessary for us to reach them, we left those issues for another day. The FCC subsequently filed a writ of certiorari, which the Supreme Court granted.

In a 5-4 decision, the Supreme Court reversed our APA ruling, holding that the FCC's "fleeting expletive" policy was not arbitrary and capricious because "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their

children." 129 S. Ct. at 1819. However, the Court declined to address the Networks' constitutional arguments, "see[ing] no reason to abandon our usual procedures in a rush to judgment without a lower court opinion," *id.*, and remanded for us to consider them in the first instance. Thus, after further briefing by the parties, intervenors, and amici, we now turn to the question that we deferred in our previous decision—whether the FCC's indecency policy violates the First Amendment.

DISCUSSION

I.

It is well-established that indecent speech is fully protected by the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) ("Where obscenity is not involved, . . . the fact that protected speech may be offensive to some does not justify its suppression." (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977))). In most contexts, the Supreme Court has considered restrictions on indecent speech to be content-based restrictions subject to strict scrutiny. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). For instance, in *Reno v. ACLU*, the Supreme Court struck down the Communications Decency Act of 1996, finding that a provision criminalizing the knowing transmission of indecent speech through the internet was unconstitutionally vague and not narrowly tailored. 521 U.S. at 882. In *Playboy*, the Supreme Court confronted a provision of the Telecommunications Act of 1996 that prohibited cable television operators from broadcasting sexual content during certain hours. While recognizing that television "presents unique problems" not present in other mediums, the Court held unequivo-

cally that the restriction was subject to strict scrutiny, and struck it down because scrambling technology provided a less restrictive means of protecting minors from indecent content. 529 U.S. at 813, 827. Similarly, the Supreme Court in *Sable Communications of California, Inc. v. FCC* declared unconstitutional a provision of the Communications Act that prohibited the transmission of indecent commercial telephone messages, so-called "dial-a-porn," finding that a total ban was not the least restrictive means available. 492 U.S. 115, 131 (1989).

Broadcast radio and television, however, have always occupied a unique position when it comes to First Amendment protection. The categorization of broadcasting as different from all other forms of communication pre-dates *Pacifica*. *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) ("Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them."(internal citation omitted)). And the Supreme Court has continuously reaffirmed the distinction between broadcasting and other forms of media since *Pacifica*. *See Reno*, 521 U.S. at 866-67; *Sable*, 492 U.S. at 127. However, it was in *Pacifica* that the Supreme Court gave its fullest explanation for why restrictions on broadcast speech were subject to a lower level of scrutiny, relying on the twin pillars of pervasiveness and accessibility to children. 438 U.S. at 748-49. While Pacifica did not specify what level of scrutiny applies to restrictions on broadcast speech, subsequent cases have applied something akin to intermediate scrutiny. *See FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

The Networks argue that the world has changed since *Pacifica* and the reasons underlying the decision are no longer valid. Indeed, we face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. Not only did Youtube, Facebook, and Twitter not exist, but their founders were either still in diapers or not yet conceived. In this environment, broadcast television undoubtedly possessed a "uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748.

The same cannot be said today. The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. Cable television is almost as pervasive as broadcast—almost 87 percent of households subscribe to a cable or satellite service—and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control. *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, at ¶ 8 (2009). The internet, too, has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs. *See In Re Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 F.C.C. Rcd. 11413, at ¶ 126 (2009) ("*CSVA Report*") ("The number of suppliers of online video and audio is almost limitless."). As the FCC itself acknowledges, "[c]hildren today live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago." *In the Matter of Empowering Parents*

and Protecting Children in an Evolving Media Landscape, 24 F.C.C. Rcd. 13171, at ¶ 11 (2009).

Moreover, technological changes have given parents the ability to decide which programs they will permit their children to watch. Every television, 13 inches or larger, sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on a standardized rating system. 47 U.S.C. § 303(x). Moreover, since June 11, 2009, when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip. *CSVA Report*, 24 F.C.C. Rcd. 11413, at ¶ 11. In short, there now exists a way to block programs that contain indecent speech in a way that was not possible in 1978. In fact, the existence of technology that allowed for household-by-household blocking of "unwanted" cable channels was one of the principle distinctions between cable television and broadcast media drawn by the Supreme Court in *Playboy*. The Court explained:

> The option to block reduces the likelihood, so concerning to the Court in Pacifica, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. The corollary, of course, is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt.

Playboy, 529 U.S. at 815 (internal citation omitted). We can think of no reason why this rationale for applying strict scrutiny in the case of cable television would not

apply with equal force to broadcast television in light of the V-chip technology that is now available.

Nevertheless, as we stated in our previous decision, we are bound by Supreme Court precedent, regardless of whether it reflects today's realities. The Supreme Court may decide in due course to overrule *Pacifica* and subject speech restrictions in the broadcast context to strict scrutiny. This Court, however, is "not at liberty to depart from binding Supreme Court precedent 'unless and until [the] Court reinterpret[s]' that precedent." *OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197, 208 (2d Cir. 2007) (quoting *Agostini v. Felton*, 521 U.S. 203, 238 (1997)) (alterations in original). The Networks, although they may wish it otherwise, seem to concede that we must evaluate the FCC's indecency policy under the framework established by the Supreme Court in *Pacifica*. *See* ABC Television Affiliates Association Br. at 12-13.

There is considerable disagreement among the parties, however, as to what framework *Pacifica* established. The FCC interprets *Pacifica* as permitting it to exercise broad regulatory authority to sanction indecent speech. In its view, the Carlin monologue was only the most extreme example of a large category of indecent speech that the FCC can constitutionally prohibit. The Networks, on the other hand, view *Pacifica* as establishing the limit of the FCC's authority. In other words, they believe that only when indecent speech rises to the level of "verbal shock treatment," exemplified by the Carlin monologue, can the FCC impose a civil forfeiture. Because *Pacifica* was an intentionally narrow opinion, it does not provide us with a clear answer to this question. Fortunately, we do not need to wade into the

brambles in an attempt to answer it ourselves. For we conclude that, regardless of where the outer limit of the FCC's authority lies, the FCC's indecency policy is unconstitutional because it is impermissibly vague. It is to this issue that we now turn.[7]

II.

It is a basic principle that a law or regulation "'is void for vagueness if its prohibitions are not clearly defined.'" *Piscottano v. Murphy*, 511 F.3d 247, 280 (2d Cir. 2007) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). A law or regulation is impermissibly vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006) (quoting *Grayned*, 408 U.S. at 108). The First Amendment places a special burden on the government to ensure that restrictions on speech are not impermissibly vague. *See Perez v. Hoblock*, 368 F.3d 166, 175 n.5 (2d Cir. 2004) ("[A] law or regulation that 'threatens to inhibit the exercise of constitutionally protected rights,' such as the right of free speech, will generally be subject to a more stringent vagueness test.") (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982))). However, "'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

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[7] Although, the Remand Order also found the broadcasts in question "profane," the FCC has abandoned that finding for the purposes of this appeal and has relied solely on its finding of indecency. *See* FCC Br. at 24 n.2. We therefore do not address its profanity finding further.

The vagueness doctrine serves several important objectives in the First Amendment context. First, the doctrine is based on the principle of fair notice. "'[W]e assume that man is free to steer between lawful and unlawful conduct" and we give him notice of what is prohibited "so that he may act accordingly.'" *Farrell*, 449 F.3d at 485 (quoting *Grayned*, 408 U.S. at 108). Notice is particularly important with respect to content-based speech restrictions "because of [their] obvious chilling effect on free speech." *Reno*, 521 U.S. at 872. Vague regulations "'inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Farrell*, 449 F.3d at 485 (quoting *Grayned*, 408 U.S. at 109)). Second, the vagueness doctrine is based "on the need to eliminate the impermissible risk of discriminatory enforcement." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). "A vague law impermissibly delegates basic policy matters to [government officials] for resolution on an ad hoc and subjective basis. . . . " *Grayned*, 408 U.S. at 108-09 (emphasis added). Specificity, on the other hand, guards against subjectivity and discriminatory enforcement.

A.

The Networks argue that the FCC's indecency test is unconstitutionally vague because it provides no clear guidelines as to what is covered and thus forces broadcasters to "steer far wider of the unlawful zone," rather than risk massive fines. In support of their position, the Networks rely on the Supreme Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997). Section 223(a) of the Communications Decency Act ("CDA") prohibited transmitting "indecent" material to minors over the Internet

while section 223(d) prohibited material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id.* at 859-60 (quoting 47 U.S.C. § 223(d)). In addition to finding that the statute was not narrowly tailored, the Court found the statute unconstitutionally vague because "the many ambiguities concerning the scope of its coverage render[ed] it problematic for purposes of the First Amendment." *Id.* at 870. The Court found that the statute's use of the "general, undefined terms 'indecent' and 'patently offensive' cover[ed] large amounts of nonpornographic material with serious educational or other value. Because of the "vague contours" of the regulation, the Court held that "it unquestionably silence[d] some speakers whose messages would be entitled to constitutional protection." *Id.* at 874. The Networks argue that since Reno found this indecency regulation unconstitutionally vague, the FCC's identically-worded indecency test for broadcasting must fall as well.

FCC argues the opposite—that *Reno* forecloses a vagueness challenge to the FCC's policy. In *Reno*, the government argued that the CDA was "plainly constitutional" under the *Pacifica* decision. *Id.* at 864. The Supreme Court rejected this argument, distinguishing *Pacifica* on the grounds that (1) the FCC is an expert agency that had been regulating the radio for decades; (2) the CDA was a categorical ban on speech while the FCC's indecency regulation designated "when—rather than whether—it would be permissible to air such a program"; (3) the order at issue in Pacifica was not punitive; and (4) the broadcast medium had traditionally received the most limited First Amendment protection. *Id.* at 867. According to the FCC, because the Court

refused to find *Pacifica* controlling of the constitutional challenges to the CDA, we must find *Reno* equally inapplicable here.

As an initial matter, we reject the FCC's argument that *Reno* forecloses the Networks' vagueness challenge. When the Supreme Court distinguished *Pacifica* in *Reno*, it did so with respect to "the level of First Amendment scrutiny that should be applied to this medium," not to its analysis of whether the statute was unconstitutionally vague. *Id.* at 870. Broadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny. It is the language of the rule, not the medium in which it is applied, that determines whether a law or regulation is impermissibly vague.

We also reject the Networks' argument that Reno requires us to find the FCC's policy vague. To be sure, the CDA's definition of indecency was almost identical to the Commission's, and language that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another. However, unlike in *Reno*, the FCC has further elaborated on the definition of indecency in the broadcast context. For example, the FCC has outlined three factors that it purportedly uses to determine whether a broadcast is patently offensive, *Industry Guidance*, 16 F.C.C. Rcd. 7999, at ¶¶ 7-8, and has declared "fuck" and "shit" presumptively indecent, *Omnibus Order*, 2001 F.C.C. Rcd. 2664, at ¶¶ 102, 107. This additional guidance may not be sufficient to survive a vagueness challenge, but it certainly distinguishes the FCC policy from the one struck down in *Reno*.

Finally, we reject the FCC's argument that the Networks' vagueness challenge is foreclosed by *Pacifica*

itself. *Pacifica*, which did not reach the question of whether the FCC's policy was unconstitutionally vague, was an intentionally narrow opinion predicated on the FCC's "restrained" enforcement policy. *Pacifica*, 438 U.S. at 761 (Powell J., concurring). The FCC's policy has now changed and we would be hard pressed to characterize it as "restrained." Thus, the questions left unresolved by *Pacifica* are now squarely before us, as the Supreme Court itself indicated in its opinion above. *See Fox*, 129 S. Ct. at 1819 ("[W]hether [the FCC's policy] is unconstitutional, will be determined soon enough, perhaps in this very case.").[8]

B.

Having concluded that neither *Pacifica* nor *Reno* resolves the question, we must now decide whether the FCC's indecency policy provides a discernible standard by which broadcasters can accurately predict what speech is prohibited. The FCC set forth its indecency

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[8] The FCC also argues that the DC Circuit's *Action for Children's Television* cases preclude Networks' vagueness challenge, but this argument fails for the same reason its *Pacifica* argument fails. The DC Circuit, like the Supreme Court, relied specifically on the FCC's restrained policy in reaching its decision. *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988), superseded by 58 F.3d 654 (D.C. Cir. 1995) (en banc) ("[T]he potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy."). Moreover, to the extent the ACT cases held that a vagueness challenge was precluded by *Pacifica*, we are not bound by the DC Circuit and do not find it persuasive. To the extent that our opinion in *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), held that the same definition of indecency was not impermissibly vague in the non-broadcast context, that holding was overruled by the Supreme Court's decision in *Reno*.

policy in its 2001 *Industry Guidance*, in which the FCC explained that an indecency finding involved the following two determinations: (1) whether the material "describe[s] or depict[s] sexual or excretory organs or activities"; and (2) whether the broadcast is "patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at ¶¶ 7-8. Under the policy, whether a broadcast is patently offensive depends on the following three factors: (1) "the explicitness or graphic nature of the description or depiction"; (2) "whether the material dwells on or repeats at length" the description or depiction; and (3) "whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value." *Id.* at ¶ 10 (emphasis added). Since 2001, the FCC has interpreted its indecency policy in a number of decisions, including *Golden Globes Order* and the orders on review here.

The FCC argues that the indecency policy in its *Industry Guidance*, together with its subsequent decisions, give the broadcasters sufficient notice as to what will be considered indecent. The Networks argue that the policy is impermissibly vague and that the FCC's decisions interpreting the policy only add to the confusion of what will be considered indecent.

We agree with the Networks that the indecency policy is impermissibly vague. The first problem arises in the FCC's determination as to which words or expressions are patently offensive. For instance, while the FCC concluded that "bullshit" in a "NYPD Blue" episode was patently offensive, it concluded that "dick" and "dickhead" were not. *Omnibus Order*, 21 F.C.C. Rcd 2664, at ¶¶ 127-128. Other expletives such as "pissed

off," up yours," "kiss my ass," and "wiping his ass" were also not found to be patently offensive. *Id.* at ¶ 197. The Commission argues that its three-factor "patently offensive" test gives broadcasters fair notice of what it will find indecent. However, in each of these cases, the Commission's reasoning consisted of repetition of one or more of the factors without any discussion of how it applied them. Thus, the word "bullshit" is indecent because it is "vulgar, graphic and explicit" while the words "dickhead" was not indecent because it was "not sufficiently vulgar, explicit, or graphic." This hardly gives broadcasters notice of how the Commission will apply the factors in the future.

The English language is rife with creative ways of depicting sexual or excretory organs or activities, and even if the FCC were able to provide a complete list of all such expressions, new offensive and indecent words are invented every day. For many years after *Pacifica*, the FCC decided to focus its enforcement efforts solely on the seven "dirty" words in the Carlin monologue. *See Infinity Order*, 3 F.C.C. Rcd. 930, at ¶ 5 (1987). This strategy had its limitations—it meant that some indecent speech that did not employ these seven words slipped through the cracks. However, it had the advantage of providing broadcasters with a clear list of words that were prohibited. Not surprisingly, in the nine years between *Pacifica* and the FCC's abandonment of this policy, not a single enforcement action was brought. This could be because we lived in a simpler time before such foul language was common. Or, it could be that the FCC's policy was sufficiently clear that broadcasters knew what was prohibited.

The FCC argues that a flexible standard is necessary precisely because the list was not effective—broadcasters simply found offensive ways of depicting sexual or excretory organs or activities without using any of the seven words. In other words, because the FCC cannot anticipate how broadcasters will attempt to circumvent the prohibition on indecent speech, the FCC needs the maximum amount of flexibility to be able to decide what is indecent. The observation that people will always find a way to subvert censorship laws may expose a certain futility in the FCC's crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard. If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so. And while the FCC characterizes all broadcasters as consciously trying to push the envelope on what is permitted, much like a petulant teenager angling for a later curfew, the Networks have expressed a good faith desire to comply with the FCC's indecency regime. They simply want to know with some degree of certainty what the policy is so that they can comply with it. The First Amendment requires nothing less.

The same vagueness problems plague the FCC's presumptive prohibition on the words "fuck" and "shit" and the exceptions thereto. Under the FCC's current policy, all variants of these two words are indecent unless one of two exceptions apply. The first is the "*bona fide* news" exception, which the FCC has failed to explain except to say that it is not absolute. The second is the artistic necessity exception, in which fleeting expletives are permissible if they are "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance."

Omnibus Order, 21 F.C.C. Rcd. 2664, at ¶ 82. In deciding whether this exception applies, the FCC "consider[s] whether the material has any social, scientific or artistic value." *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C. Rcd. 4507, at ¶ 11 (2005) ("*Saving Private Ryan*").

As we stated in our previous opinion:

> Although the Commission has declared that all variants of "fuck" and "shit" are presumptively indecent and profane, repeated use of those words in "Saving Private Ryan," for example, was neither indecent nor profane. And while multiple occurrences of expletives in "Saving Private Ryan" was not gratuitous, a single occurrence of "fucking" in the Golden Globe Awards was "shocking and gratuitous." Parental ratings and advisories were important in finding "Saving Private Ryan" not patently offensive under contemporary community standards, but irrelevant in evaluating a rape scene in another fictional movie. The use of numerous expletives was "integral" to a fictional movie about war, but occasional expletives spoken by real musicians were indecent and profane because the educational purpose of the documentary "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." The "S-Word" on The Early Show was not indecent because it was in the context of a "bona fide news interview," but "there is no outright news exemption from our indecency rules."

Fox, 489 F.3d at 463 (internal citations and emphasis omitted). There is little rhyme or reason to these deci-

sions and broadcasters are left to guess whether an expletive will be deemed "integral" to a program or whether the FCC will consider a particular broadcast a "*bona fide* news interview."

The FCC created these exceptions because it recognized that an outright ban on certain words would raise grave First Amendment concerns. In the *Omnibus Order*, the FCC "recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee." 21 F.C.C. Rcd. 2664, at ¶ 15. Likewise, in applying the "artistic necessity" exception, the FCC noted that it was obligated to "proceed with due respect for the high value our Constitution places on freedom and choice in what the people say and hear," particularly with respect to speech that has "social, scientific or artistic value." *Saving Private Ryan*, 20 F.C.C. Rcd. 4507, at ¶ 11 (internal quotation marks omitted). It is these same concerns that informed the FCC's original "restrained" enforcement policy, which had the advantage of prohibiting the most egregious instances of indecent speech while minimizing the burden on protected speech.

The FCC's current indecency policy undoubtedly gives the FCC more flexibility, but this flexibility comes at a price. The "artistic necessity" and "*bona fide* news" exceptions allow the FCC to decide, in each case, whether the First Amendment is implicated. The policy may maximize the amount of speech that the FCC can prohibit, but it results in a standard that even the FCC cannot articulate or apply consistently. Thus, it found the use of the word "bullshitter" on CBS's The Early Show

to be "shocking and gratuitous" because it occurred "during a morning television interview," *Omnibus Order*, 21 FCC Rcd 2664, at ¶ 141, before reversing itself because the broadcast was a "bona fide news interview." *Remand Order*, 21 FCC Rcd. 13299, at ¶ 68. In other words, the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason—that the word "bullshitter" was uttered during a news program. And when Judge Leval asked during oral argument if a program about the dangers of pre-marital sex designed for teenagers would be permitted, the most that the FCC's lawyer could say was "I suspect it would." With millions of dollars and core First Amendment values at stake, "I suspect" is simply not good enough.

With the FCC's indiscernible standards come the risk that such standards will be enforced in a discriminatory manner. The vagueness doctrine is intended, in part, to avoid that risk. If government officials are permitted to make decisions on an "ad hoc" basis, there is a risk that those decisions will reflect the officials' subjective biases. *Grayned*, 408 U.S. at 108-09. Thus, in the licensing context, the Supreme Court has consistently rejected regulations that give government officials too much discretion because "such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal quotation marks omitted); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) (permit scheme facially unconstitutional because "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether

the licensor is permitting favorable, and suppressing unfavorable, expression").

We have no reason to suspect that the FCC is using its indecency policy as a means of suppressing particular points of view. But even the risk of such subjective, content-based decision-making raises grave concerns under the First Amendment. Take, for example, the disparate treatment of "Saving Private Ryan" and the documentary, "The Blues." The FCC decided that the words "fuck" and "shit" were integral to the "realism and immediacy of the film experience for viewers" in "Saving Private Ryan," but not in "The Blues." *Fox*, 489 F.3d at 463. We query how fleeting expletives could be more essential to the "realism" of a fictional movie than to the "realism" of interviews with real people about real life events, and it is hard not to speculate that the FCC was simply more comfortable with the themes in "Saving Private Ryan," a mainstream movie with a familiar cultural milieu, than it was with "The Blues," which largely profiled an outsider genre of musical experience. But even if there were a perfectly benign way of explaining these particular outcomes, nothing would prevent the FCC from applying its indecency policy in a discriminatory manner in the future. As the Supreme Court explained in *Forsyth*:

> It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether

> there is anything in the ordinance preventing him from doing so.

505 U.S. at 133 n.10 (internal quotation marks and citations omitted).

The FCC argues that its context-based approach is consistent with, indeed even required by, *Pacifica*. While *Pacifica* emphasized the importance of context in regulating indecent broadcasts, *see* 438 U.S. at 750, it did so in order to emphasize the limited scope of its holding, finding that the particular "context" of the Carlin monologue justified an intrusion on broadcasters rights under the First Amendment. It does not follow that the FCC can justify any decision to sanction indecent speech by citing "context." Of course, context is always relevant, and we do not mean to suggest otherwise in this opinion. But the FCC still must have discernible standards by which individual contexts are judged.

The FCC assures us that it will "bend over backwards" to protect editorial judgment, at least in the news context, but such assurances are not sufficient given the record before us. Instead, the FCC should bend over backwards to create a standard that gives broadcasters the notice that is required by the First Amendment.[9]

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[9] The FCC recently filed a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure drawing our attention to certain language in the Supreme Court's recent decision in *Humanitarian Law Project v. Holder*, No. 08-1498, 2010 WL 2471055 (June 21, 2010). Given the entirely different procedural posture in *Humanitarian Law Project*, we conclude that it is inapposite to the issues before us here.

III.

Under the current policy, broadcasters must choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose. Indeed, there is ample evidence in the record that the FCC's indecency policy has chilled protected speech.

For instance, several CBS affiliates declined to air the Peabody Award-winning "9/11" documentary, which contains real audio footage—including occasional expletives—of firefighters in the World Trade Center on September 11th. Although the documentary had previously aired twice without complaint, following the *Golden Globes Order* affiliates could no longer be sure whether the expletives contained in the documentary could be found indecent. *See* Larry Neumeister, "Some CBS Affiliates Worry over 9/11 Show," *Associated Press*, Sept. 3, 2006. In yet another example, a radio station cancelled a planned reading of Tom Wolfe's novel I Am Charlotte Simmons, based on a single complaint it received about the "adult" language in the book, because the station feared FCC action. When the program was reinstated two weeks later, the station decided that it could only safely air the program during the "safe harbor" period.

The FCC's application of its policy to live broadcasts creates an even more profound chilling effect. In the case of the 2003 Billboard Music Awards broadcasts, Fox had an audio delay system in place to bleep fleeting expletives. It also pre-cleared the scripts of the presenters. Ritchie, however, departed from her script and used three expletives in rapid sequence. While the per-

son employed to monitor and bleep expletives was bleeping the first, the following two slipped through. Even elaborate precautions will not protect a broadcaster against such occurrences. The FCC argues that Fox should simply implement a more effective screening system, but, short of giving up live broadcasting altogether, no system will ever be one hundred percent effective.[10] Instead, Fox may decide not to ask individuals with a history of using profanity to present at its awards shows.[11] But, of course, this will not prevent someone who wins an award—such as Cher or Bono—from using fleeting expletives. In fact, the only way that Fox can be sure that it won't be sanctioned by the FCC is by refusing to air the broadcast live.

This chilling effect extends to news and public affairs programming as well. Broadcasters may well decide not to invite controversial guests on to their programs for fear that an unexpected fleeting expletive will result in fines. The FCC points to its "*bona fide* news" exception to show that such fears would be unfounded. But the FCC has made clear that it considers the decision to apply this exception a matter within its discretion. Otherwise, why not simply make an outright news exception? During the previous proceedings before this Court, ami-

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[10] Nor would such a system be costless 10 for broadcasters. For instance, Fox estimates that installing an audio delay system for all live programming would cost an estimated $16 million a year.

[11] Indeed, there is evidence in the record that broadcasters have made personnel decisions on the basis of the FCC's indecency policy. For instance, public radio personality Sandra Loh was fired after a single use of an expletive as "a precautionary measure to show the station had distanced itself . . . in case the FCC investigates." Greg Braxton, "KCRW Fires Loh Over Obscenity," *L.A. Times* (Mar. 4, 2004), *available at* http://articles.latimes.com/2004/mar/04/local/me-loh4.

cus curiae gave the example of a local station in Vermont that refused to air a political debate because one of the local politicians involved had previously used expletives on air. The record contains other examples of local stations that have forgone live programming in order to avoid fines. For instance, Phoenix TV stations dropped live coverage of a memorial service for Pat Tillman, the former football star killed in Afghanistan, because of language used by Tilliman's family members to express their grief. A station in Moosic, Pennsylvania submitted an affidavit stating that in the wake of the FCC's new policy, it had decided to no longer provide live, direct-to-air coverage of news events "unless they affect matters of public safety or convenience."[12] If the FCC's policy is allowed to remain in place, there will undoubtedly be countless other situations where broadcasters will exercise their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC's fines. This chill reaches speech at the heart of the First Amendment.

The chill of protected speech has even extended to programs that contain no expletives, but which contain reference to or discussion of sex, sexual organs, or excretion. For instance, Fox decided not to re-broadcast an episode of "That 70s Show" that dealt with masturbation, even though it neither depicted the act or discussed it in specific terms. The episode subsequently won an

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[12] Nor are these concerns unfounded. The Commission currently has several pending investigations concerning expletives uttered during live news and sports programming. For instance, after a surprise win against Notre Dame, the University of Pittsburgh quarterback stated that he was "so fucking proud of our football team" on live television. The FCC's investigation into this incident is ongoing.

award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue. Similarly, an episode of "House" was re-written after concerns that one of the character's struggles with psychiatric issues related to his sexuality would be considered indecent by the FCC.

As these examples illustrate, the absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of human attention. By prohibiting all "patently offensive" references to sex, sexual organs, and excretion without giving adequate guidance as to what "patently offensive" means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster's peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.

IV.

For the foregoing reasons, we strike down the FCC's indecency policy. We do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC's current policy fails constitutional scrutiny. The petition for review is hereby GRANTED.

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

IN THE MATTER OF COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005

Released: Nov. 6, 2006
Adopted: Nov. 6, 2006

ORDER

By the Commission: Commissioner Adelstein concurring in part, dissenting in part, and issuing a statement.

TABLE OF CONTENTS

Heading		Paragraph #
I.	INTRODUCTION	[1]
II.	BACKGROUND	[2]
III.	DISCUSSION	[11]
	A. "The 2003 Billboard Music Awards"	[12]
	B. "The 2002 Billboard Music Awards"	[55]
	C. "The Early Show"	[67]
	D. "NYPD Blue"	[74]
IV.	ORDERING CLAUSES	[78]

I. INTRODUCTION

1. In this Order, we address complaints alleging that four television programs ("The 2002 Billboard Music Awards," "The 2003 Billboard Music Awards," "NYPD Blue," and "The Early Show") contained indecent and/or profane material.[1] After considering the comments submitted by broadcasters as well as other interested parties, we find that comments made by Nicole Richie during "The 2003 Billboard Music Awards" and by Cher during the "The 2002 Billboard Music Awards" are indecent and profane as broadcast but that the complained-of material aired on "The Early Show" is neither indecent nor profane. In addition, we dismiss on procedural grounds the complaints involving "NYPD Blue" as inadequate to trigger enforcement action.

II. BACKGROUND

2. On March 15, 2006, the Commission released Notices of Apparent Liability and a Memorandum Opinion and Order ("*Omnibus Order*") resolving numerous complaints that television broadcasts aired between February 2, 2002, and March 8, 2005, contained indecent, profane, and/or obscene material.[2] Section III.A of the *Omnibus Order* proposed monetary forfeitures against six different television broadcasts for apparent violations of

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[1] For purposes of this Order, we refer to all of the complained-about episodes of "NYPD Blue" as a single "program."

[2] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*"), *pets. for review pending, Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir. filed Apr. 13, 2006), *remanded and partially stayed*, Sept. 7, 2006 ("*Remand Order*").

our prohibitions against indecency and/or profanity.[3] Section III.C addressed twenty-eight broadcasts that we concluded did not violate indecency, profanity, and/or obscenity restrictions for various reasons.[4] In the portion of the *Omnibus Order* at issue here, Section III.B, the Commission considered complaints filed against four programs.

3. *"The 2002 Billboard Music Awards."* The Commission received a complaint concerning "The 2002 Billboard Music Awards" program that aired on Station WTTG(TV), Washington, DC, beginning at 8:00 p.m. Eastern Standard Time on December 9, 2002.[5] The complaint specifically alleged that during the broadcast Cher, an award winner, stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[6]

4. *"The 2003 Billboard Music Awards."* The Commission received a number of complaints about the "The 2003 Billboard Music Awards" program that aired on Fox Television Network stations beginning at 8:00 p.m. Eastern Standard Time on December 10, 2003.[7] The complaints concerned a segment in which Nicole Richie, an award presenter, stated, "Have you ever tried to get

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[3] *Id.* at 2670-90 ¶¶ 22-99.

[4] *Id.* at 2700-20 ¶¶ 146-232.

[5] *Id.* at 2690 ¶ 101. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

[6] *Id.* The Enforcement Bureau obtained a videotape of the broadcast that confirmed the allegation in the complaint. *Omnibus Order*, 21 FCC Rcd at 2690 ¶ 101.

[7] *Id.* at 2692 ¶ 112.

cow shit out of a Prada purse? It's not so fucking simple."[8]

5. *"NYPD Blue."* The Commission received complaints concerning the use of the term "bullshit" in several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, beginning at 9:00 p.m. Central Standard Time on various dates between January 14 and May 6, 2003.[9]

6. *"The Early Show."* The Commission received a viewer complaint that Station KDKA-TV, Pittsburgh, Pennsylvania, licensed to CBS Broadcasting, Inc. ("CBS"), aired the word "bullshit" during "The Early Show" at approximately 8:10 a.m. Eastern Standard

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[8] *Id.* at ¶ 112 and n. 164.

[9] *Id.* at 2696 ¶ 125. The Commission provided the following descriptions of the complained-of portions of the broadcasts:

> 1/14/03 episode (Det. Sipowitz in response to his partner's arrest by Internal Affairs): "Alright, this is Bullshit!"
>
> 2/4/03 episode (Det. Sipowitz to street officer regarding that officer's partner framing Sipowitz's partner): "Over time—over what—bullshit, a beef!"
>
> 2/18/03 episode (stated by a suspect who bragged about, but now denies, killing his daughter): "I told people I killed Samia to try and get respect back. She had ashamed me and my community look at me as a fool." Det. 1: "You took credit for killing your daughter?! Bullshit!"
>
> 4/15/03 episode (Det. harassing suspect who had harassed prosecutor): "I'm hoping this bullshit about you trying to get under ADA Haywood's skin is a misunderstanding."
>
> 5/6/03 episode (Captain to Det. who harassed suspect in 4/15 episode): "He said you nearly assaulted his client last night.' Det.: 'Well, that's a bunch of bullshit."

Id. at n. 187.

Time on December 13, 2004.[10] A videotape obtained from CBS showed that during a live interview with Twila Tanner, a contestant on the CBS program "Survivor: Vanuatu," Ms. Tanner referred to another contestant as a "bullshitter."[11]

7. In Section III.B of the *Omnibus Order*, the Commission found that the broadcasts at issue apparently violated the statutory and regulatory prohibitions against airing indecent and profane material.[12] In light of the circumstances, however, the Commission did not initiate forfeiture proceedings against the relevant licensees.[13] All of the broadcasts discussed in Section III.B, except for the "The Early Show," preceded the *Golden Globe Awards Order*,[14] in which the Commission made clear that the isolated use of an offensive expletive

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[10] *Id.* at 2698-99 ¶ 137.

[11] *Id. See id.* at 2699 n.199 ("In commenting on the strategy employed by the fellow contestant, Ms. Tanner stated: 'I knew he was a bullshitter from Day One.' The interviewer, Julie Chen, recognized the inappropriateness of the language, stating: 'I hope we had the cue ready on that one . . . We can't say that word . . . There is a delay.'").

[12] *Id.* at 2690-2700 ¶¶ 100-45. *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999. However, with respect to complaints regarding the use of the words "dick" and "dickhead" in episodes of "NYPD Blue," the Commission found that in context the broadcasts of these terms were not patently offensive under its contextual analysis and based on FCC precedent. *Omnibus Order*, 21 FCC Rcd at 2696-97 ¶ 127.

[13] *Omnibus Order*, 21 FCC Rcd at 2690 ¶ 100.

[14] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), review granted, 19 FCC Rcd 4975, 4981 ¶¶ 13-14 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending.*

could be actionably indecent.[15] The FCC also stated that its precedent at the time of "The Early Show" broadcast "did not clearly indicate that the Commission would take enforcement action against an isolated use" of "shit" (the "S-Word") or its variants.[16] Accordingly, consistent with its commitment to proceed with caution and restraint in this area, the Commission decided that it would not take any adverse action against any licensee as a result of these apparent violations.[17]

8. Following release of the *Omnibus Order*, several parties petitioned for judicial review of Section III.B, asserting a variety of constitutional and statutory challenges. Fox Television Stations, Inc. ("Fox") and CBS filed a joint petition for review in the United States Court of Appeals for the Second Circuit.[18] ABC Television Network ("ABC") and Hearst-Argyle Television, Inc. ("Hearst") filed a joint petition for review in the United States Court of Appeals for the D.C. Circuit, which later transferred the petition to the Second Circuit. The Second Circuit consolidated the petitions on June 14, 2006.[19]

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[15] *See Omnibus Order*, 21 FCC Rcd at 2692 ¶ 111, 2695 ¶ 124, 2698 ¶ 136.

[16] *Id.* at 2700 ¶ 145.

[17] *Id.* at 2690 ¶ 100.

[18] *See supra* n. 2 (noting pending petitions for review).

[19] The Second Circuit also granted motions to intervene in the Fox-CBS case by NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates Association, and the Center for Creative Community, Inc. Before transferring the ABC-Hearst case, the D.C. Circuit granted ABC Television Affiliates Association's motion to intervene.

9. At the same time, several parties complained to the Commission about the process the Commission followed in formulating Section III.B of the *Omnibus Order*. The Commission ordinarily provides broadcasters with an opportunity to file responses and raise arguments before imposing forfeiture liability.[20] With one exception, however, the FCC did not seek the views of the licensees affected by Section III.B of the *Omnibus Order* because the Commission did not impose any sanctions on them.[21] Following the release of the *Omnibus Order*, broadcasters complained that they should have had an opportunity to present their views before the Commission reached its decisions in Section III.B. Upon reflection, the Commission agreed and stated that it wanted to ensure that all of the affected licensees were afforded a full opportunity to be heard before the Commission issued a final decision with respect to the broadcasts at issue. Accordingly, on July 5, 2006, the Commission asked the Second Circuit for a voluntary remand of the case and stay of the briefing schedule. The Commission asked the court to remand the case for 60 days in order to afford interested parties an opportu-

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[20] *See* 47 U.S.C. § 503(b)(4)(A); *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8015-16 ¶¶ 26-27 (2001) ("*Indecency Policy Statement*").

[21] The Commission did send a narrow Letter of Inquiry ("LOI") regarding "The 2003 Billboard Music Awards" broadcast, receiving a limited response from Fox on January 30, 2004. Fox also responded to a supplemental LOI without presenting new legal arguments. The Commission did not send LOIs regarding the complained-of broadcasts of "The 2002 Billboard Music Awards," "NYPD Blue," and "The Early Show" prior to the court's remand.

nity to file responses and the Commission an opportunity to give the issues further consideration.

10. The Second Circuit granted the Commission's motion on September 7, 2006, remanding for a period of 60 days "for the entry of a further final or appealable order of the FCC following such further consideration as the FCC may deem appropriate in the circumstances."[22] On the same day, the Commission announced a two-week filing period for interested parties wishing to submit comments concerning the four cases.[23] The Enforcement Bureau separately issued Letters of Inquiry ("LOIs") to Fox, CBS, and KMBC Hearst-Argyle Television, Inc. on September 7, 2006, and to those broadcasters as well as other parties to the Second Circuit proceeding on September 18, 2006.

III. DISCUSSION

11. Consistent with our commitment to consider the comments and LOI responses filed following the Second Circuit's *Remand Order* and to take a fresh look at the issues raised by the four programs at issue on remand, we vacate Section III.B of the *Omnibus Order* in its entirety and replace it with the decisions below.

A. "The 2003 Billboard Music Awards"

12. *The Programming.* The Commission, Fox, stations licensed to Fox or its affiliated companies, and affiliates of the Fox Television Network all received a number of complaints from individual viewers and orga-

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[22] *Remand Order* at 2.

[23] *See* Public Notice, *FCC Announces Filing Procedures In Connection With Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006).

nizations alleging that Fox stations aired indecent material during "The 2003 Billboard Music Awards" program on December 10, 2003 between 8 p.m. and 10 p.m. Eastern Standard Time.[24] The complainants alleged that Nicole Richie, who with Paris Hilton presented an award on the program, uttered language that was indecent and profane in violation of 18 U.S.C. § 1464 and the Commission's rule restricting the broadcast of indecent material. The complainants requested that the Commission impose sanctions against each station that aired the remarks.

13. The Bureau sent Fox a letter of inquiry on January 7, 2004.[25] Fox responded on January 30, 2004, attaching a transcript of the material at issue.[26] According to Fox, the program announcer introduced Paris Hilton and Nicole Richie, stars of the Fox Television Network show "The Simple Life,"[27] as follows: "To pre-sent the

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[24] FCC File Nos. EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091.

[25] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc. (January 7, 2004).

[26] *See* Letter from John C. Quale, Counsel, Fox Television Stations, Inc., to Investigations and Hearings Division, Enforcement Bureau, FCC, File No. EB-03-IH-0617 (January 30, 2004) ("*Response*").

[27] "The Simple Life," which debuted on December 2, 2003, followed Ms. Hilton's and Ms. Richie's fish-out-of-water adventures upon being transplanted from Beverly Hills, California to an Arkansas farm for 30 days. A *New York Times* review described the show as "[a]n updated 'Green Acres'" featuring "Ms. Hilton, 22, of the hotel fortune, and Ms. Richie, also 22, daughter of the pop singer Lionel Richie." Alessandra Stanley, *With a Rich Girl Here and a Rich Girl There*, N.Y. Times, Dec. 2, 2003, at E1. The cover of the Simple Life DVD describes Ms. Hilton and Ms. Richie in the following manner: "They're Rich. They're Sexy. They're TOTALLY-OUT-OF-CONTROL!" Discussing Fox executives' original idea for the show in an interview, one executive touched

award for Top 40 Mainstream Track, here are two babes whose lives are anything but mainstream. From their hit TV series, 'The Simple Life,' please welcome Nicole Richie and Paris Hilton." Following that introduction, Paris Hilton and Nicole Richie walked onstage to present the award. Fox-owned stations and Fox affiliates in the Eastern and Central Time Zones then broadcast the following exchange between them:

Paris Hilton:	Now Nicole, remember, this is a live show, watch the bad language.
Nicole Richie:	Okay, God.
Paris Hilton:	It feels so good to be standing here tonight.
Nicole Richie:	Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.[28]

14. Fox contends that this broadcast was not actionably indecent. Although Fox concedes that it broadcast the F-Word, it argues that the word, in context, did not depict or describe sexual activities but rather, "at most," was a "vulgar expletive used to express emphasis," and

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on the same excretory theme as "The 2003 Billboard Awards" script, stating that "'[t]hey wanted to see stilettos in cow shit.'" *http://web.archive.org/web/20040215040316/http://www.tvweek.com/topstorys/112403simplelife.html*. Daily Variety's review of the premiere episode also described Ms. Richie's penchant for "bad language," labeling her as "potty-mouthed." Brian Lowry, *The Simple Life*, Daily Variety, Nov. 25, 2003 at 4.

[28] *See Response* at 3-4.

thus is outside the scope of the Commission's indecency definition.[29] As for the use of the S-Word, Fox does not deny that it was used in the excretory sense. It argues, however, that the dialogue "contained at most a passing reference to an excretory by-product (i.e., 'cow shit') and an expletive used for emphasis," that the dialogue lasted only 22 seconds, and that it was not pandering, titillating or shocking.[30] Therefore, Fox contends that the dialogue is not actionably indecent.

15. *Indecency Analysis.* The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.[31] Thus, indecency findings require two primary determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards for the broadcast medium.[32] In our assessment of whether broadcast material is patently offensive, "the full context in which the

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[29] *Id.* at 12-13.

[30] *Id.*

[31] *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (*citing Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

[32] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 8 (emphasis in original); *see Omnibus Order*, 21 FCC Rcd at 2667 ¶ 12.

material appeared is critically important."[33] Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length the descriptions; and (3) whether the material panders to, titillates or shocks the audience.[34] In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly other, factors."[35] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[36] or, alternatively, removing the broadcast material from the realm of indecency.[37]

16. With respect to the first determination, Fox does not dispute that Ms. Richie's comment—"Have you ever tried to get cow shit out of a Prada purse?"—refers to excrement, and we conclude that it is clearly within the

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[33] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

[34] *Id.* at 8002-15 ¶¶ 8-23.

[35] *Id.* at 8003 ¶ 10.

[36] *Id.* at 8009 ¶ 19 (*citing Tempe Radio, Inc. (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (same)).

[37] *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 20 ("the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

scope of our indecency definition. Fox does contend that Ms. Richie's use of the "F-Word"—in the statement "[i]t's not so fucking simple"—does not describe sexual activities and thus falls outside the scope of our indecency definition, but we disagree. A long line of precedent indicates that the use of the "F-Word" for emphasis or as an intensifier comes within the subject matter scope of our indecency definition.[38] Given the core meaning of the "F-Word," any use of that word has a sexual connotation even if the word is not used literally.

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[38] *See, e.g., Grant Broadcasting System II, Inc. Licensee WJPR-TV*, 12 FCC Rcd 8277, 8279 (Mass Media Bur. 1997) (NAL issued for non-literal uses of the "F-Word" and the "S-Word," such as "this fucking place is going to blow up"); *Pacifica Foundation, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 ¶¶ 12-13 (1987) (subsequent history omitted) (distinguishing between the use of "expletives" and "speech involving the description or depiction of sexual . . . functions" but indicating that both fall within the subject matter scope of our indecency definition). The Enforcement Bureau's departure from this precedent in its *Golden Globe Awards* decision, *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards,"* Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), was contrary to this precedent and thus appropriately overturned by the Commission. While the Bureau cited two cases for the proposition that the use of the "F-Word" did not necessarily fall within the subject matter scope of our indecency definition, both cases were inapposite. First, the "F-Word" was not even an issue in *Entercom*, which addressed the words "prick" and "piss," and, in any event, was a Bureau rather than a Commission decision. *See Entercom Buffalo License, LLC (WGR(AM))*, Order, 17 FCC Rcd 11997 (Enf. Bur. 2002). Second, in *Peter Branton*, the Commission did not rule that the some uses of the "F-Word" fell outside the subject matter scope of our indecency definition. Rather, we decided that the uses of the "F-Word" there were not "patently offensive" in the context of the news programming at issue in that case. *See Peter Branton*, 6 FCC Rcd 610 (1991), *appeal dismissed*, 993 F.2d 906 (D.C. Cir. 1993), *cert. den.* 511 U.S. 1052 (1994).

Indeed, the first dictionary definition of the "F-Word" is sexual in nature.[39] Moreover, it hardly seems debatable that the word's power to "intensify" and offend derives from its implicit sexual meaning.[40] Accordingly, we conclude that, as we stated in *Golden Globe*,[41] its use inherently has a sexual connotation and thus falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

17. We will first address the first and third principal factors in our contextual analysis—the explicitness or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. The complained-of material is quite graphic and explicit. Ms. Richie's comment referring to excrement conveys a graphic image of Ms. Richie trying to scrape cow excrement out of her designer hand bag. Because of her use of the "S-Word," Ms. Richie's description also contained quite vulgar language. Furthermore, the vulgar description of excrement was coupled with the use of the "F-Word." As we have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[42]

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[39] *See, e.g.*, American Heritage College Dictionary 559 (4th ed. 2002) (defining the F-Word as "1: to have sexual intercourse with").

[40] *See* Robert F. Bloomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 Santa Clara L. Rev. 65, 98 (1999) ("all F-word usage has at least an implicit sexual meaning").

[41] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

[42] *See id.*

Here, Ms. Richie's use of the "F-Word" coupled with her graphic and explicit description of the handling of excrement during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking.[43] Her comments were also presented in a pandering manner. As part of their dialogue, Ms. Hilton reminded Ms. Richie to "watch the bad language," a comment that served to preview and highlight for the viewing audience Ms. Richie's remarks. Moreover, Fox does not argue that there was any justification for Ms. Richie's comments.[44]

18. We note that when the Supreme Court stressed the importance of context in *Pacifica*, it mentioned as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium.[45] All of these factors support the conclusion that the dialogue here was patently offensive in context. The complained-of material was broadcast early in prime time. The program's content was, as discussed above, graphic, explicit

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[43] To the extent that Fox argues that it did not present Ms. Richie's comment for "shock value," *see, e.g., Response* at 13, it fundamentally misunderstands the contextual analysis employed by the Commission. "In evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster." *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Order on Reconsideration, 21 FCC Rcd 6653, 6657-58 ¶ 12 (2006) ("*Super Bowl Order on Reconsideration*"), *pet. for review pending, CBS Corp. v. FCC*, No. 06-3575 (3d Cir. filed July 28, 2006).

[44] For example, Fox does not argue that Ms. Richie's remarks had any artistic merit or were necessary to convey any message.

[45] *See Pacifica*, 438 U.S. at 749-51.

and vulgar, both in its excretory description and its use of the "F-Word." The program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars. Although there is no requirement that we document the presence of children in the audience for a program that is subject to an indecency complaint and is aired between 6 a.m. and 10 p.m.,[46] we note that in this case a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2003 Billboard Music Awards" broadcast, 2,312,000 (23.4%) of the 9,871,000 people watching the program were under 18, and 1,089,000 (11%) were between the ages of 2 and 11. In addition, we note that this program was rated TV-PG(DL). Such a rating would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[47]

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[46] *See Action for Children's Television* v. *FCC*, 58 F.3d 654, 665 (D.C. Cir. 1995) (en banc) ("*ACT III*") (holding that the Commission could rely on bright-line time channeling rule and rejecting contention that it was required to use "station-specific and program-specific data in assessing whether children are at risk of being exposed to broadcast indecency"), *cert. denied*, 516 U.S. 1072 (1996).

[47] Fox notes that its policy is to rate any programming containing the "F-Word" TV-MA. *See* Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, in FCC File Nos. EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091 at 4 (filed Sept. 29, 2006) ("Fox Response to 9/18/2006 LOI"). The TV-MA rating (mature audience only) signifies that the program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17. In the context of a TV-MA rated program, an "L" would signify "crude indecent language." The TV-PG rating (parental guidance suggested), by contrast, merely signifies that the program contains material that

This no doubt helps explain the strong feelings that many of the complainants, particularly those who were watching the program with their children, expressed regarding the unexpectedly vulgar content.[48] In light of

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parents may find unsuitable for younger children, and that parents may want to watch the program with their younger children. TV-PG is the most common rating, covering a majority of the programs that are rated. *See* Nancy Signorielli, *Age-Based Ratings, Content Designations, and Television Content: Is There a Problem?*, 8 Mass Comm. & Soc'y 277, 293 (2005) (six in ten rated programs are rated TV-PG). The "D" signifies that the program may contain some suggestive dialogue, and the "L" signifies that the program may contain some infrequent coarse language. Moreover, we note that the TV-PG(DL) rating appeared only at the beginning and once in the middle of the program; thus, a viewer tuning into this 2-hour broadcast at another time may not even have been aware that it was rated TV-PG(DL). *See Pacifica*, 438 U.S. at 748 ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.").

[48] *See, e.g.*, e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("I would appreciate it if you would pass on my intense opinion of the Billboard Awards and Nicole Ritchie (sic). We teach our kids that people like her have a potty mouth. My children were watching part of this program and happened to catch her vulgarity. We will not finish watching the awards nor will we continue to watch fox network in this household."); e-mail complaint from individual to Fox station WTVT(TV), Tampa, dated January 21, 2004 ("Fox insults my ears and those of my wife and children with the "f' word, etc. and we leave you for good . . . "); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("Why are you allowing that kind of language at 8:00 p.m. for all ages of people to hear? . . . It was disgusting and very disturbing . . . "); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 13, 2003 ("I was watching the event with my 12 and 13 y/o daughters . . . the amount of swearing that was done and the severity of some of the words was horrible . . . Watching TV has become very unpredictable these days . . . I do not feel it is a safe source of entertainment for our children. . . .");

all of these factors, we conclude that the first and third factors in our contextual analysis both weigh heavily in favor of a finding that the material is patently offensive.

19. With respect to the second factor in our contextual analysis—whether the complained-of material was sustained or repeated—Fox argues that the dialogue here was a "fleeting and isolated utterance" and that such material is not actionably indecent.[49] We disagree.

20. Fox's argument that a "fleeting and isolated utterance" is not actionably indecent is based largely on staff letters and dicta in decisions predating the Commission's *Golden Globe Awards Order*. For example, in a 1987 decision clarifying that our indecency definition was not restricted only to the seven words contained in the George Carlin monologue determined to be indecent in *Pacifica*, the Commission distinguished in dicta between "expletives"—words such as the "F-Word" or the "S-Word" used outside of their core sexual or excretory meanings—and descriptions of sexual or excretory functions. And, in so doing, the Commission suggested: "If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of in-

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complaint from individual to David Solomon, Chief of Enforcement Bureau, dated December 12, 2003 ("I was horrified to learn that some of the young children in the school that I teach in viewed the program. Several of these children are among those children who have social problems and are often in trouble. Is this what our children have to look toward for example on how to live? Would you want your children or grandchildren to mimic these entertainers ?????") All of these complaints except for the last one to the FCC's Enforcement Bureau are attached to Fox's January 30, 2004 *Response*.

[49] *Response* at 12, 13.

decency."[50] The Commission made clear, however, that repetition was *not* required when speech "involv[es] a description or depiction of sexual or excretory functions" and that "[t]he mere fact that specific words or phrases are not *repeated* does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[51] In this case, Ms. Richie's use of the "S-Word" clearly involved "a description of excretory functions."[52]

21. Subsequent to this 1987 guidance, there were several Bureau-level decisions finding the isolated use of an expletive not to be actionably indecent.[53] In no case, however, did the Commission itself, when evaluating an actual program, find that the isolated use of an expletive, such as the "F-Word," as broadcast was not indecent or could not be indecent. In our 2001 *Indecency Policy Statement*,[54] we explained that "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency,"[55] but also noted "even relatively fleeting references may be found indecent where other factors contribute to a

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[50] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699. *See also New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice, 2 FCC Rcd 2726 (1987).

[51] *See Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699 (emphasis added).

[52] *Id.*

[53] *See, e.g., Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 12 n.32 (listing Bureau-level decisions).

[54] *Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶¶ 17-19.

[55] *Id.* at 8008 ¶ 17.

finding of patent offensiveness."[56] Then, in 2004, the Commission itself considered for the first time in an enforcement action whether a single use of an expletive could be indecent. And in evaluating the broadcast of the F-Word during "The Golden Globe Awards," we overturned the Bureau-level decisions holding that an isolated expletive could not be indecent and disavowed our 1987 dicta on which those decisions were based.

22. While it is important to understand the history of the Commission's decisions in this area, we reject Fox's suggestion that Nicole Richie's comments would not have been actionably indecent prior to our *Golden Globe* decision.[57] Rather, Ms. Richie's remarks would have been actionably indecent prior to our *Golden Globe* decision for three separate reasons. First, even under our pre-*Golden Globe* dicta, the offensive material here does not consist solely of the use of expletives; as discussed above, the "S-Word" was used here in its excretory sense and was integral to a graphic and vulgar description that clearly falls within the scope of our indecency rule. As we stated in our 1987 guidance, "repetitive use" was not required under such circumstances.[58] Second, the offensive language was "repeated" in that it included not one but two extremely graphic and offensive words. Third, there seems to be little doubt that

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[56] *Id.* at 8009 ¶ 19.

[57] In this respect, our decision differs from our suggestion in Section III.B of the *Omnibus Order*, now vacated, that prior to the Commission's decision in *Golden Globe* this broadcast would not have warranted enforcement action because it involved an "isolated use of expletives." *See Omnibus Order*, 21 FCC Rcd at 2695 ¶ 124. For the reasons discussed above, we do not believe that our prior suggestion accurately reflected the context of this broadcast or Commission precedent.

[58] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699.

Ms. Richie's comments were deliberately uttered and that she planned her comments in advance.[59] Ms. Hilton's opening remark to Ms. Richie that this was a live show and she should "watch the bad language" strongly suggests that the offensive language that followed was not spontaneous. Further, there is nothing in Ms. Richie's confident and fluid delivery of the lines, and her use of multiple offensive words, that suggests that any of the language was a spontaneous slip of the tongue. Thus, given the presence of a graphic description of excretory functions, the presence of multiple offensive words, and the deliberate nature of Ms. Richie's comments, we conclude that this broadcast would have been actionably indecent consistent with prior Commission guidance even in the absence of our *Golden Globe* decision.[60]

23. In addition, this broadcast is actionably indecent under the *Golden Globe Awards Order*.[61] In that Order, we stated that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offen-

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[59] *See id.* (discussing "deliberate" use of expletives).

[60] For these reasons, Ms. Richie's comments differ significantly from the language involved in the two Bureau-level decisions finding fleeting expletives not to be indecent that were cited in the *Indecency Policy Statement*. *See Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶ 18. Rather, they are more similar to the material in the *LBJS Broadcasting Company* Notice of Apparent Liability cited in the *Indecency Policy Statement* because they combine a graphic and vulgar description of sexual or excretory material with an expletive. *Id.* at 8009 ¶ 19, *citing LBJS Broadcasting Company*, 13 FCC Rcd 20956 (Mass Media Bur. 1998) (forfeiture paid) (finding broadcast apparently indecent for use of phrase "[s]uck my dick you fucking cunt").

[61] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12.

sive to the broadcast medium is not indecent."[62] While, as explained above, Commission dicta and Bureau-level decisions issued before *Golden Globe* had suggested that expletives had to be repeated to be indecent but "descriptions or depictions of sexual or excretory functions" did not need to be repeated to be indecent, we believe that this guidance was seriously flawed. We thus reaffirm that it was appropriate to disavow it. To begin with, any strict dichotomy between "expletives" and "descriptions or depictions of sexual or excretory functions" is artificial and does not make sense in light of the fact that an "expletive's" power to offend derives from its sexual or excretory meaning.[63] Indeed, this is why it has long been clear that such words fall within the subject matter scope of our indecency definition, which since *Pacifica* has involved the description of sexual or excretory organs or activities.[64] Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions. Finally, and perhaps most importantly, categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context.[65] In evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination.[66] To the extent that Commission dicta had

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[62] *Id.*

[63] *See supra* para. 16.

[64] *Pacifica*, 438 U.S. at 742.

[65] *Indecency Policy Statement*, 16 FCC Rcd at 8002-03 ¶ 9.

[66] *Id.* at ¶¶ 9-10.

previously suggested that one of these factors—whether material had been repeated—would always be decisive in a certain category of cases, we believe that such dicta was at odds with the Commission's overall enforcement policy and was appropriately disavowed.

24. Turning back to "The 2003 Billboard Music Awards" broadcast, we believe that we need not ignore "the first blow" to the television audience in the circumstances presented here.[67] Nor do we think that *Pacifica* requires that approach. The major broadcast networks ("Networks") argue that the *Pacifica* Court "would have never approved" an indecency enforcement regime that applied to isolated and fleeting expletives.[68] But this claim finds no support in *Pacifica*, in which the Court specifically reserved the question of "an occasional expletive" and noted that it addressed only the "particular broadcast" at issue in that case.[69] Indeed, we think it significant that the "occasional expletive" contemplated by the Court was one that occurred in "a two-way radio conversation between a cab driver and a dispatcher,"—a conversation not broadcast to a wide audience—"or a telecast of an Elizabethan comedy," settings far removed from the broadcast at issue here.[70]

25. In explaining the special nature of the broadcast medium, the Supreme Court emphasized the "pervasive presence [of the broadcast medium] in the lives of all Americans" and that indecent broadcasts invade the

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[67] *Pacifica*, 438 U.S. at 748-49.

[68] Joint Comments of Fox, CBS, NBC Universal, Inc. and NBC Telemundo License Co. in DA 06-1739 at 3 (filed Sept. 21, 2006) ("*Joint Comments*").

[69] *Pacifica*, 438 U.S. at 742, 750.

[70] *Id.* at 750.

privacy of the home. It rejected the argument that one could protect oneself by turning off the broadcast upon hearing indecent language: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[71] We believe that granting an automatic exemption for "isolated or fleeting" expletives unfairly forces viewers (including children) to take "the first blow." Indeed, it would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time. For example, broadcasters would be able to air any one of a number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided that they did not air more than one expletive in any program segment.[72] Such a result would be inconsistent with our obligation to enforce the law responsibly. We do not believe that viewers of free television broadcasts utilizing the public airwaves should feel, as so many of the complaining viewers of "The 2003 Billboard Music Awards" clearly do, that they cannot safely allow their families to watch prime-time broadcasts.[73]

26. Nor, as discussed above, are the Networks correct in their suggestion that fleeting utterances have never before been regulated. On the contrary, our *Golden Globe Awards* decision was not the first time

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[71] *Id.* at 748-49.

[72] Such words could include grossly offensive sexual terms such as "cunt."

[73] *See* complaints listed in note 48 *supra*. Like the broadcast in *Pacifica*, Ms. Richie's statements "could have enlarged a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749.

that a fleeting utterance had been found to be indecent.[74] We have long recognized that "even relatively fleeting references may be found indecent" if the context makes them patently offensive.[75]

27. We thus conclude that the fact that the offensive dialogue here was relatively brief is not dispositive under these particular circumstances. This is not a case involving a single, spontaneously uttered expletive. Rather, it was two sentences, one of which contained a graphic excretory description and the other a vulgar expletive used to heighten the effect of the excretory description. And, as noted above, these statements were not spontaneous slips of the tongue, but rather were planned by the speaker and presaged by the introductory remark to "watch the bad language."

28. With respect to our analysis of the complained-of material, we emphatically reject the argument made by Fox and other broadcasters that the "contemporary community standards" employed by the Commission merely reflect the "subjective opinions" or "the tastes of the individuals with seats on the Commission."[76] Rather, as we have previously stated, in evaluating material, we rely on the Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens."[77]

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[74] *Indecency Policy Statement*, 16 FCC Rcd at 8009 ¶ 19.

[75] *See id.* (listing examples of isolated utterances found to be actionably indecent).

[76] *Joint Comments* at 10-11.

[77] *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 ¶ 12 (2004).

29. In this case, moreover, our assessment of contemporary community standards for the broadcast medium is strongly bolstered by broadcasters' own practices. As mentioned above, during the 10:00 p.m.-6:00 a.m. "safe harbor," broadcasters are permitted to air indecent and profane material. Nevertheless, with rare exceptions, they do not allow the "F-Word" or the "S-Word" to be broadcast during that time period. Fox, for example, "generally prohibit[s] use of any form of the F-word or S-word during any day part, *including late-night programming*."[78] NBC also "does not broadcast the 'F-Word' and the 'S-Word'" during the "safe harbor" "except in unusual circumstances" and generally does not allow such language to be broadcast on its flagship late-night program "The Tonight Show with Jay Leno."[79] Similarly, ABC, even during safe harbor hours, "generally has not approved the broadcast of the 'f-word' and the 's-word.'"[80] For instance, during a recent broadcast of "Nightline," ABC deleted uses of the "F-Word" in a piece on actor Mark Wahlberg.[81] CBS, likewise, indicates that "[g]enerally speaking, broadcast[s] of the 'F-word' and 'S-word' are not permitted under CBS's Television Network Standards *at any time of [the] day*."[82]

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[78] Fox Response to 9/18/2006 LOI at 4 (emphasis added).

[79] Letter from F. William LeBeau to Marlene H. Dortch, Secretary, FCC, File Nos. EB-03-IH-0355, EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091, EB-05-IH-0007 at 4-5 (Sept. 29, 2006) ("NBC Response to 9/18/2006 LOI").

[80] Letter from John W. Zucker, Senior Vice President, ABC, Inc. to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0355 at 2 (Sept. 29, 2006) ("ABC Response to 9/18/2006 LOI").

[81] "Nightline," Sept. 29, 2006.

[82] Letter from Anne Lucey, Senior Vice President, CBS Corp. to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 at 2

Hearst also reports that its general policy, "which applies *at all times*, is that vulgar language such as the F-Word and the S-Word [is] not to be knowingly broadcast."[83] To be sure, each of the broadcasters avers that in certain contexts, such as the motion picture *Saving Private Ryan*, they do permit the broadcast of the "F-Word" and the "S-Word." However, none of these examples bears even the slightest resemblance to Nicole Richie's comments during "The 2003 Billboard Music Awards."[84] Indeed, in Congressional testimony, Fox's President of Entertainment recognized that the very comments at issue here—Ms. Richie's remarks—contained "inappropriate language."[85] Moreover, Fox edited out her comments in its broadcasts to the Mountain and Pacific Time Zones.

30. Taken as a whole, broadcasters' practices with respect to programming aired during the safe harbor reflect their recognition that airing the "F-Word" and the "S-Word" on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium. They also reinforce our conclusion that Nicole Richie's comments during "The 2003

(Sept. 29, 2006) ("CBS Response to 9/18/2006 LOI") (emphasis added).

[83] Response of Hearst-Argyle Television, Inc., File No. EB-03-IH-0355 at 3 (Sept. 29, 2006) ("Hearst Response to 9/18/2006 LOI") (emphasis added).

[84] *See* ABC Response to 9/18/2006 LOI at 2; CBS Response to 9/18/2006 LOI at 2-3; Hearst Response to 9/18/2006 LOI at 4-5; NBC Response to 9/18/2006 LOI at 3-4; Fox Response to 9/18/2006 LOI at 4.

[85] *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. on Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman).

Billboard Music Awards" were patently offensive under contemporary community standards. For all of these reasons, we conclude that, given the explicit, graphic, vulgar, and shocking nature of Ms. Richie's comments, they were patently offensive under contemporary community standards for the broadcast medium and thus indecent as broadcast.[86]

31. We also disagree that it would be inequitable to hold Fox responsible for airing offensive language during "The 2003 Billboard Music Awards" due to the live, unscripted nature of the material.[87] In disclaiming responsibility, Fox states that Nicole Richie's and Paris Hilton's scripted dialogue did not contain the "F-Word" or "S-Word." Rather, Ms. Richie's first scripted line read: "Yeah—instead of standing in mud and pig crap." When she spoke, she substituted "cow shit" (which was blocked out in the audio feed) for "pig crap" in that line. In the sentences at issue here, Ms. Richie was scripted to say "Have you ever tried to get cow manure out of a Prada purse? It's not so freaking simple."[88]

32. Fox also describes the measures it employed to delete objectionable material from the broadcast. It says that as in previous years—including during "The 2002 Billboard Music Awards" broadcast when it aired Cher's use of the phrase "fuck 'em"—it utilized a five-

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[86] The Networks also complain about the Commission's analysis of contemporary community standards in other pending proceedings, such as *The Blues: Godfathers and Sons*. *See Joint Comments* at 10. In the case of *The Blues*, the Commission has issued only a Notice of Apparent Liability for Forfeiture, *see Omnibus Order* at 2683-87 ¶¶ 7285, and we will address such issues in further proceedings in that case.

[87] *See Response* at 13.

[88] *Id.* at 6.

second delay that it normally used during the production of live entertainment programming. A Broadcast Standards employee monitored the broadcast and operated a "delay button" that enables an employee to edit out objectionable content before it airs. Fox also assigned a Broadcast Standards representative to the event to review the script, attend dress rehearsals and be present at the event, as it normally did for the production of live entertainment events. During "The 2003 Billboard Music Awards" program, the employee operating the delay button edited out the vulgar phrase "cow shit" the first time Ms. Richie said it, but failed to edit out the remaining offensive language discussed above. The program aired several hours later on stations in the Mountain and Pacific time zones, and Fox did remove the offensive language before it aired on those stations.[89]

33. As Fox points out, the FCC has long recognized that it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event under some circumstances.[90] But the Commission has not hesitated to enforce its indecency standard

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[89] *Id.* at 8-9. Following this broadcast, Fox implemented a longer delay mechanism and a second delay button for all live broadcasts to serve as a back-up. *Id.* at 9. In its recent response to a LOI relating to the broadcast of "The 2002 Billboard Music Awards," Fox states that it now uses a total of four delay buttons for all live broadcasts of entertainment programming. In addition, it "recognizes that certain performers may present more risk of spontaneous objectionable content during live performances than others" and thus "has begun to tape in advance certain performances to air during otherwise 'live' broadcasts." See Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0460 at 6 (Sept. 21, 2006) ("Fox Response to 9/7/06 LOI").

[90] *Pacifica*, 438 U.S. at 733 n.7, *quoting Pacifica Foundation*, 59 FCC 2d at 893 n.1. *See Response* at 12.

where, as here, a licensee fails to exercise "reasonable judgment, responsibility and sensitivity to the public's needs and tastes to avoid patently offensive broadcasts."[91] Here, the original script for "The 2003 Billboard Music Awards" increased the likelihood that Ms. Richie would ad-lib offensive remarks; as noted above, it called for her to make excretory references to "pig crap" and "cow manure," and to substitute the euphemism "freaking" for the "F-Word."[92] Such a script

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[91] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2700 ¶ 18. *See Liability of San Francisco Century Broadcasting, L.P.*, Memorandum Opinion and Order, 8 FCC Rcd 498, 499 ¶ 7 (1993) ("the mere fact that a show is live does not excuse a station from exercising its editorial responsibilities, especially where commonly available screening techniques can eliminate the element of surprise."), *citing Sound Broadcasting Corp.*, Notice of Apparent Liability, 6 FCC Rcd 2174 (Mass Media Bur. 1991); *Radio Station KFMH-FM, Muscatine, Iowa*, Notice of Apparent Liability, 9 FCC Rcd 1681, 1681-82 (Mass Media Bur. 1994) (rejecting contention that licensee should not be held responsible for broadcasting live and unscripted offensive material from an outside source where the broadcaster suspected "that the caller involved was the same person who had told the objectionable joke only eight minutes earlier" but "chose to place the call on the air rather than to discontinue the broadcast or to use precautions such as a delay device."); *L.M. Communications*, Notice of Apparent Liability, 7 FCC Rcd 1595 (Mass Media Bur. 1992) (rejecting argument that broadcaster should not be sanctioned for airing indecent material within live and unscripted programming where "the scatological material as broadcast involved a deliberate and repetitive use of the word 'crap' to heighten the audience's awareness of and attention to the subsequent use of the term 'shit' by the announcer.").

[92] *See* Response at 6; *see also Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, 21 FCC Rcd 2760, 2769 ¶ 19 (2006) (citing evidence that "there is always a risk that performers will ad-lib remarks or take unscripted actions, and that the risk level varies according to the nature of the performance.") (subsequent history omitted).

might have posed minimal risk in the hands of some performers. Relying on Ms. Hilton and Ms. Richie to avoid vulgar language, however, involved a substantially greater risk.[93] As Fox well knew, Ms. Richie frequently used indecent language in inappropriate contexts. For example, during the three episodes of "The Simple Life" that it broadcast in the days leading up to the "The 2003 Billboard Music Awards," Fox felt it necessary to bleep expletives (the "F-Word" or "S-Word") uttered by Ms. Richie no fewer than nine times.[94] Yet Ms. Richie was still selected as a presenter for the live, prime-time awards show, and Fox has not claimed it made any effort to caution Ms. Richie about its broadcast standards for the program or that it took any special precautions (beyond its standard five-second delay) to guard against her use of expletives on the air. Indeed, Fox does not even contend that it took any action against Ms. Richie after this episode.

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[93] *See supra* note 27. As discussed above, Fox advertised Ms. Hilton and Ms. Richie as being "totally-out-ofcontrol" on the cover of the Simple Life DVD. Additionally, *The Los Angeles Times* review of the first episode of "The Simple Life" describes Ms. Hilton and Ms. Richie as "out-of-control." Carina Chocano, *Work for a Living? What a Concept*, L.A. Times, Dec. 2, 2003, at 1 (Calendar Section).

[94] "*The Simple Life*," Season 1, Episodes 1-3. In addition, Ms. Richie's penchant for cursing is highlighted in a scene during the first episode in which their host, reviewing the house rules with them, states "no cussing or bad language," at which point the camera focuses on Ms. Richie giggling helplessly at Ms. Hilton. Their penchant for vulgarity is also illustrated during the third episode in two scenes at a local fast food franchise where Ms. Richie and Ms. Hilton are working for the day. Directed to change the letters of a sign out front to read "Half Price Burgers All Day," they instead arrange the letters to read "1/2 Price Anal Salty Weiner Bugers." Later, standing on the curb in costumes of the restaurant's mascot, an animated milkshake, they stick up their respective middle fingers (which are pixilated) to passersby.

34. Even more significant, the particular five-second delay and editing system that Fox used in this case had already proved inadequate to delete Cher's offensive language during Fox's broadcast of "The 2002 Billboard Music Awards" the previous year. During that broadcast, Cher, when accepting an award, had stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[95] According to Fox, the employee in charge of deleting objectionable material did not act quickly enough and ended up editing out dialogue that aired after Cher's comment.[96] Despite this failure, Fox took no additional precautions to avoid airing such material the next year.[97] The record also demonstrates that steps may be taken, such as adding "delay buttons" or lengthening the delay, that allow for far more effective editing of potentially objectionable content.[98] Here, Fox itself contends that the time delay and editing system that it used for "The 2003 Billboard Music Awards" was inadequate, maintaining that it imposed on the operator a "Herculean task" because he was "essentially trying to watch two programs at once—the live version occurring in real-time and the delayed version that was broadcast seconds later."[99] Then, if he heard or saw objectionable content, he was required to "press the appropriate audio and/or video delay buttons at the precise instant necessary to eliminate the objectionable content from the delayed feed" while at the same time "staying abreast of

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[95] *See infra* para. 56.

[96] *See* Fox Response to 9/7/06 LOI at 5.

[97] *See* Response at 5.

[98] *See, e.g., id.* at 8-9.

[99] Fox Response to 9/18/2006 LOI at 10 n. 21.

the continuing live feed."[100] In short, under these circumstances, Fox should have recognized the high risk that "The 2003 Billboard Music Awards" broadcast raised of airing indecent material. Nevertheless, Fox chose to rely on the same delay and editing system that had proved inadequate the previous year to delete an expletive during the same show. We are not persuaded, therefore, that Fox's efforts to edit out the offensive language were diligent or reasonable.

35. We recognize that no delay and editing system is foolproof and that there is always a possibility of human error in using delay equipment to edit live programming. The Commission can and will consider these facts in deciding what, if any, remedy is appropriate. In this case, however, as discussed above, we conclude that Fox's efforts to prevent and edit out Ms. Richie's comments were not diligent or reasonable.

36. Holding Fox responsible for airing indecent material in this case does not place live broadcasts at risk or impose undue burdens on broadcasters.[101] This case does not involve breaking news coverage that Fox and other broadcasters have traditionally presented in so-called "real time."[102] Nevertheless, Fox argues that

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[100] *Id.* By contrast, Fox states that its current time delay and editing system "relies upon technology to ensure that once an edit button is pressed, the potentially objectionable content is edited at the right time during the delayed feed." *Id.* As stated above, Fox's current system also utilizes more than one employee "to provide redundancy." *Id.* at 10.

[101] *See Joint Comments* at 12-16.

[102] Since this case does not involve breaking news or sports programming, we do not address issues involving such programming here. But as we recognize elsewhere in this Order, "in light of the important First Amendment interests at stake as well as the crucial role that context

"[t]he live presentation of awards shows . . . is what makes this content so compelling."[103] Fox, however, did not even decide to air the program live in much of the country. Rather, viewers in the Mountain Time Zone saw the program with a one-hour delay, and those in the Pacific Time Zone experienced a three-hour delay. We find it difficult to understand why viewers on the East Coast would no longer find "live programming" to be "compelling" with a ten-second delay while it is evidently acceptable to provide this programming to viewers in the western half of the country with a one-hour or three-hour delay. Moreover, with respect to awards shows as a whole, the record reflects that the vast majority of awards shows are not aired by major networks live in the Pacific Time Zone.[104] Rather, they are generally broadcast with a three-hour delay, thus undermining any assertion that it is important that viewers see the presentation of the awards without the comparatively minimal delay required to remove indecent language.

37. Under the circumstances, we fail to see how a delay of five, ten, or even fifteen seconds meaningfully affects the value of this programming or significantly implicates First Amendment values. In this vein, we

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plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming." *See infra*, § III.C.

[103] See *Joint Comments*, Appendix X (Declaration of Peter Ligouri) at ¶ 2.

[104] Of the 32 awards shows that were broadcast by the major networks and are discussed in the record, only the Academy Awards aired live in all time zones. *See* ABC Response to 9/18/2006 LOI at 2; NBC Response to 9/18/2006 LOI at 4 and Exh. C.; Fox Response to 9/18/2006 LOI at 3-4; CBS Response to 9/18/2006 LOI at 7.

note that so-called "live" programming is not literally live—viewers at home do not see an event at the very time that it is actually occurring. Rather, there is a natural delay caused by the time that it takes a signal to reach viewers. The record shows that digital signals, for example, may take up to 1.3 to 3.3 seconds to reach viewers over-the-air.[105] And, if viewers are receiving such signals through a cable operator or satellite provider, there may be an additional delay of up to 3 seconds.[106] Finally, if a viewer has a digital video recorder, there is another additional delay of approximately another half-second.[107] Thus, using a conservative estimate, a viewer may be watching an event more than three seconds after it occurs, even in the absence of any delay technology. In light of this, we fail to see how there is a meaningful adverse impact on a viewer's experience because he or she learns the winner of the Billboard Award for Top 40 Mainstream Track some eight to eighteen seconds after the winner is announced on stage in Las Vegas (with a delay) as opposed to after the normal three to six seconds (without one).

38. Finally, we note that our decision here will not deprive Fox of the ability to present such programming in substantially the same way that it has in the past. Fox has utilized a time delay and other procedures to

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[105] Fox Response to 9/18/2006 LOI at 11.

[106] *Id.*

[107] *Id. See* ABC Response to 9/18/2006 LOI at 7-8 (reporting that transmitting signals from ABC's New York Broadcast Center to affiliates results in less than a two second delay, that feeding live material from remote locations to ABC's New York Broadcast Center may cause an additional delay of up to a second, and that distribution of the signals to the consumers through cable and satellite systems may cause an additional delay).

avoid airing patently offensive material during live entertainment broadcasts such as "The 2003 Billboard Music Awards" for years before the Commission's decision in the *Golden Globe Awards Order*.[108] We also disagree that "delaying live broadcasts to edit potentially offensive language inevitably results in overbroad censorship of appropriate material."[109] As the D.C. Circuit observed, "some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available."[110] The possibility that an over-zealous broadcast standards employee may "dump" material that is not actionably indecent during the live presentation of an awards show does not outweigh the compelling interest in preventing patently offensive broadcasts such as the one that occurred in this case.

39. For all of these reasons, we conclude that Fox's broadcast of "The 2003 Billboard Music Awards" violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency and that it is not inequitable to hold Fox responsible for these violations.

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[108] *See Response* at 8; *see also* Fox Response to 9/7/06 LOI at 5. In addition, Fox uses delays for live entertainment broadcasts even after 10 p.m. *See id.* at 5-7. The Commission's indecency regulation does not apply at that time, *see* 47 C.F.R. § 73.3999(b), so Fox obviously has reasons apart from regulatory compulsion for using a delay.

[109] *Joint Comments* at 15.

[110] *Action for Children's Television v. FCC*, 59 F.3d 1249, 1261 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (*ACT IV*), *citing Pacifica*, 438 U.S. at 743. *See ACT III*, 58 F.3d at 666 ("Whatever chilling effects may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act.").

40. *Profanity Analysis.* Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that the complained-of language in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[111] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[112] Similarly, we concluded in the *Omnibus Order* that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane.[113] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[114] However, such circumstances are not present here: Fox does not contend that Ms. Richie's profane language was essential to informing viewers on a matter of public importance or that modifying the lan-

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[111] 18 U.S.C. § 1464.

[112] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).

[113] *Omnibus Order*, 21 FCC Rcd at 2686 ¶ 81 ("Like the 'F-Word,' [the 'S-Word'] is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.").

[114] *Id.* at 2669 ¶ 19, *citing Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

guage would have had a material impact on its function as a source of news and information. On the contrary, Fox sought (albeit unsuccessfully) to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[115] It is undisputed that the complained-of material, including the "F-Word" and the "S-Word," was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination.[116] Because there was a reasonable risk that children may have been in the audience at the time of the broadcast on December 10, 2003,[117] the broadcast is legally actionable.

41. Contrary to the Networks' *Joint Comments*, we believe that our interpretation of "profane" as used in Section 1464 is appropriate.[118] The word has long carried a variety of meanings, including non-religious meanings.[119] Several courts have interpreted the word

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[115] *Response* at 8.

[116] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

[117] *See supra* para. 18 (noting that, according to Nielsen ratings data, 23.4% of the people watching an average minute of "The 2003 Billboard Music Awards" broadcast were under 18, and 11% were between the ages of 2 and 11).

[118] *See Joint Comments* at 28-32; Thomas Jefferson Center For the Protection of Free Expression Comments at 11-15 (Sept. 21, 2006).

[119] The 1891 edition of the Century Dictionary includes this definition of profane: "2. To put to a wrong use; employ basely or unworthily." Century Dictionary 4754 (1891 ed.). In an appendix to his concurring opinion in *Burstyn v. Wilson*, 343 U.S. 495, 533-40 (1952), Justice Frankfurter collected definitions of "sacrilege," "blasphemy," and "profane" dating to 1651. The earliest of these definitions of profane is "to apply any thing sacred to common use. To be irreverent to sacred persons or things. To put to a wrong use." *Id.* at 536, *quoting* Rider, A New Universal English Dictionary (London, 1759). The next is "To violate; to pollute.—To put to wrong use." *Id.* at 537, *quoting*

in a non-religious sense, consistent with the established rule that a court should construe a statute, if reasonably possible, to avoid constitutional problems.[120] Further,

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Kenrick, A New Dictionary of the English Language (London, 1773). Frankfurter's concurring opinion also notes that Funk & Wagnalls' New Standard Dictionary of the English Language, first copyrighted in 1913, includes a definition of "to profane" as "3. To vulgarize; give over to the crowd." *Id.* at 527 n. 48. Thus, we disagree that Congress clearly would have understood the term in 1927 to mean only blasphemous or sacrilegious. *Joint Comments* at 28.

[120] *See Tallman v. United States*, 465 F.2d at 286; *State v. Richards*, 896 P.2d 357, 364 (Id. App. 1995) (in rejecting a vagueness challenge to state statute proscribing telephone harassment through, *inter alia*, "obscene, lewd or profane language," construing "profane" to mean "characterized by abusive language . . . cursing or vituperation . . . "); *see also United States v. Hicks*, 980 F.2d 963, 970 n.9 (5th Cir. 1992) (angry reference to flight attendant as a "bitch" and angry admonition that she should get her "ass" to the plane's kitchen qualified as "profane"). We disagree with the Networks that Tallman addressed the word's meaning in dicta, and that the case actually refutes the Commission's interpretation because the Court cited with approval *Duncan v. United States*, 48 F.2d 128 (9th Cir.), *cert. denied*, 383 U.S. 863 (1931), and *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966). *See Joint Comments* at 31. *Tallman* held that the word "profane" in Section 1464 must be interpreted narrowly as, *inter alia*, "denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance" to preserve its validity in response to a facial constitutional challenge. *Tallman*, 465 F.2d at 286. The Court cited *Duncan* and *Gagliardo* solely as examples of prior judicial interpretations available to the trial judge had jury instructions on the word's meaning been necessary, without approving or even identifying such interpretations. *Id.* We also reject the Networks' argument that the rule of lenity counsels against the Commission's interpretation of "profane." *See Joint Comments* at 30, n.34. Among other things, the Networks make no showing that their preferred construction of the term is any narrower than the Commission's. Indeed, we think it likely that more broadcast speech would be considered "profane" under the Networks'

when viewed in its statutory context with the words "obscene" and "indecent," both of which have vulgar overtones, we believe that the word "profane" is reasonably interpreted in the related sense of "grossly offensive."[121] We do not read the cases cited by the Networks as precluding a non-religious interpretation. *Duncan* upheld a conviction for broadcasting profanity where the defendant "referred to an individual as 'damned,'" "used the expression 'By God' irreverently," and "announced his intention to call down the curse of God upon certain individuals."[122] But the court held only that this language was "within the meaning of that term" as used in the Ra-

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interpretation of the term than under ours. *See also infra* para. 54 (explaining that the *Pacifica* Court squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, such as the rule of lenity).

[121] *See State v. Richards*, 896 P.2d at 364 ("when words appear in a list or are otherwise associated, they should be given related meanings."), *citing Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961), 2A Norman J. Singer, Southerland's Statutes and Statutory Construction § 47.16 at 183 (5th ed. 1992); *United States v. Hicks*, 980 F.2d at 970 n.9 ("By 'profanity' or 'vulgarity,' we refer to words that, while not obscene, nevertheless are considered generally offensive by contemporary community standards."). The fact that the words "indecent" and "profane" in Section 1464 have "separate" meanings does not render our interpretation of profane "implausible." *See Joint Comments* at 31, *quoting Pacifica*, 438 U.S. at 739-40. We recognize that the two words have separate meanings, and the Commission interprets the two words differently. Our enforcement policy limiting the regulation of profane language to words that are sexual or excretory in nature or are derived from such terms stems from First Amendment considerations rather than the meaning of the word. *See Omnibus Order*, 21 FCC Rcd at 2669 ¶ 18.

[122] *Duncan*, 48 F.2d at 133-34 (the phrase "God damn it" uttered in anger was not profane under Section 1464).

dio Act of 1927, not that the provision *only* covered such language.[123] *Gagliardo* addressed the meaning of "profane" in Section 1464 only in *dicta*, because the government in that case did not contend that the words at issue were profane.[124] Finally, the fact that the Commission has a specific rule addressing "obscene" and "indecent" programming[125] plainly does not foreclose the agency from exercising in an adjudication its express statutory authority to take enforcement action against broadcasts that are "profane."[126]

42. *Constitutional Issues.* The Networks offer a variety of arguments attacking the constitutionality of the Commission's indecency framework as it relates to "The 2003 Billboard Music Awards" broadcast. We do not find any of these arguments to be persuasive.

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[123] *Id.* at 134. *Duncan* was decided before constitutional law evolved to the point that such language could not be proscribed. *See Burstyn v. Wilson*, 343 U.S. 495 (1952) (holding unconstitutional a New York statute authorizing state officials to license films for public exhibition unless the films are "sacrilegious").

[124] *Gagliardo*, 366 F.2d at 725 ("God damn it" uttered in anger not legally profane). The FCC did not address whether "profane" could be interpreted in a non-religious sense in *Raycom America, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 4186 (2003) (portions of "The West Wing" in which a character "'scream[ed] at God,' and made irreverent references toward the deity—'[y]ou're a sonofabitch, you know that?,' and 'have I displeased you, you feckless thug?'" not actionably profane), and *Warren B. Appleton*, 28 FCC 2d 36 (Broadcast Bur. 1971) ("damn" not actionably profane), because those cases involved language with religious connotations.

[125] 47 C.F.R. § 73.3999.

[126] 47 U.S.C. § 1464; 47 U.S.C. § 503(b)(1)(D). *See Joint Comments* at 32.

43. First, the Networks argue that our definition of indecency is unconstitutionally vague.[127] However, that definition is essentially the same as the one that we articulated in the order under review in *FCC v. Pacifica Foundation*.[128] The Supreme Court had no difficulty in applying that definition and using it to conclude that the broadcast at issue in that case was indecent.[129] We agree with the D.C. Circuit that "implicit in *Pacifica*" is an "acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge."[130]

44. The Networks suggest that the Supreme Court's more recent decision in *Reno v. ACLU*[131] has "undermine[d] any constitutional defense of the Commission's current approach" to indecency.[132] In *Reno*, the Court considered the constitutionality of the Communications Decency Act of 1996 (CDA), a statute that regulated indecency on the Internet and that contained a definition similar to ours.[133] Though the Court did not hold that the statute was "so vague that it violates the Fifth Amendment," it concluded that "the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment."[134]

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[127] *See, e.g., Joint Comments* at 7-8.

[128] *Pacifica*, 438 U.S. at 732.

[129] *See id.* at 739, 741.

[130] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *accord ACT III*, 58 F.3d at 659.

[131] 521 U.S. 844 (1997).

[132] *Joint Comments* at 7.

[133] *See* 47 U.S.C. § 223(d) (1994 Supp. II).

[134] *Reno*, 521 U.S. at 870.

45. *Reno* in no way undermines *Pacifica*. On the contrary, the Court in *Reno* expressly distinguished *Pacifica*, and it gave three different reasons for doing so. First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when—rather than whether—it would be permissible" to air indecent material.[135] The CDA, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times."[136] Second, the CDA was a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts.[137] Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection."[138] Thus, far from casting doubt on *Pacifica*'s vagueness holding, *Reno* recognizes its continuing vitality.

46. The Networks also argue that the more relaxed level of First Amendment scrutiny discussed in *Pacifica* should no longer apply to broadcasting in light of changes in the media marketplace. Specifically, they contend that because of the prevalence of other media, such as the Internet and cable and satellite television, "it is fanciful to believe that aggressive enforcement of § 1464 against broadcasters will be effective in prevent-

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[135] *Id.* at 867.

[136] *Id.*

[137] *See id.* at 867, 872; *see also Pacifica*, 438 U.S. at 750 (declining to decide whether an indecent broadcast "would justify a criminal prosecution").

[138] *Reno*, 521 U.S. at 867 (quoting *Pacifica*, 438 U.S. at 748).

ing children from being exposed to potentially offensive words."[139]

47. We disagree that technological changes have undermined the validity of the reasoning in *Pacifica*.[140] In *Pacifica*, the Court identified two reasons why broadcasting has received "the most limited First Amendment protection."[141] First, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home."[142] Second, "broadcasting is uniquely accessible to children, even those too young to read."[143]

48. Notwithstanding the growth of other communications media, courts have recognized the continuing validity of these rationales. In 1994, the Supreme Court reaffirmed that "our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."[144] And the D.C. Circuit has rejected precisely the argument advanced by the Networks here: "Despite the increasing availability of other means of receiving television, such as cable, . . . there can be no doubt that the traditional broadcast media are properly

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[139] *Joint Comments* at 22.

[140] In any event, the Commission has no authority to overrule *Pacifica*. Cf. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[141] *Pacifica*, 438 U.S. at 748.

[142] *Id.*

[143] *Id.* at 749.

[144] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994); *see also Reno*, 521 U.S. at 868 (recognizing "special justifications for regulation of the broadcast media").

subject to more regulation than is generally permissible under the First Amendment."[145]

49. The broadcast media continue to have "a uniquely pervasive presence" in American life. The Supreme Court has recognized that "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'"[146] Though broadcast television is "but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression."[147] In 2003, 98.2% of households had at least one television, and 99% had at least one radio.[148] The Networks correctly point out that almost 86% of households with television subscribe to a cable or satellite service.[149] That still leaves 15.4 million households that rely exclusively on broadcast television, hardly an inconsequential num-

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[145] *ACT III*, 58 F.3d at 660. *See also Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004) (rejecting argument that broadcast ownership regulations should be subjected to higher level of scrutiny in light of the rise of "non-broadcast media").

[146] *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (*quoting U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

[147] *Id.* at 194.

[148] U.S. Census Bureau, *Statistical Abstract of the United States* 737 (2006).

[149] *Joint Comments* at 21 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 8 (2006) ("*Annual Assessment*")).

ber.[150] In addition, it has been estimated that almost half of direct broadcast satellite subscribers receive their broadcast channels over the air,[151] and many subscribers to cable and satellite still rely on broadcast for some of the televisions in their households.[152] All told, the National Association of Broadcasters ("NAB") estimates that there are an estimated 73 million broadcast-only television sets in American households.[153] Moreover, many of those broadcast-only televisions are in children's bedrooms. According to a 2005 Kaiser Family Foundation report, 68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections.[154]

50. In addition, the bare number of cable and satellite service subscribers does not reflect the large disparity in viewership that still exists between broadcast and cable television programs. For example, during the week of September 18, 2006, each of the top ten pro-

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[150] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15; *see also* Comments of the Walt Disney Co. in MB Docket No. 04-210 at 2 (filed Aug. 11, 2004) ("Disney/ABC stresses that these customers [relying on broadcast only] represent a significant portion of our potential viewing audience.").

[151] *Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, No. 04-210, ¶ 9 (MB Feb. 28, 2005), *available at* 2005 WL 473322, at *2.

[152] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15.

[153] *Id.* at 2552 ¶ 97. The NAB has properly characterized this number as "enormous." Reply Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. in MB Docket No. 04-210 at i (filed Sept. 7, 2004).

[154] *See* Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005).

grams on broadcast television had more than 15 million viewers, while only one program on cable television that week managed to attract more than 5 million viewers.[155] Similarly, of the 495 most-watched television programs during the 2004-2005 season, 485 appeared on broadcast television, and the highest-rated program on cable television was only the 257th most-viewed program of the season.[156]

51. The broadcast media are also "uniquely accessible to children." In this respect, broadcast television differs from cable and satellite television. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to "fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it."[157] In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters."[158] The V-chip provides parents with some ability to control their children's access to broadcast programming. But most tele-

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[155] *See* Nielsen Media Research, "Top 10 Broadcast TV Programs for the Week of September 18, 2006;" Nielsen Media Research, "Top 10 Cable TV Programs for the Week of September 18, 2006."

[156] *See* Television Bureau of Advertising, "Season-to-Date Broadcast vs. Subscription TV Primetime Ratings: 2004-2005," *available at* http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2004-2005.asp.

[157] 47 U.S.C. § 560 (2000); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

[158] *ACT III*, 58 F.3d at 660.

visions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.[159] In addition, the effectiveness of a V-chip depends on the accuracy of program ratings; a V-chip is of little use when, as here, the rating does not reflect the material that is broadcast.[160] In light of the TV-PG rating given to "The 2003 Billboard Music Awards," even an informed use of a V-chip would not necessarily have protected children from Ms. Richie's vulgar comments,[161] and studies demonstrate that inaccurate ratings are far from an isolated problem. In a Kaiser Family Foundation survey, for example, nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately.[162]

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[159] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667 ¶ 37. In Congressional testimony shortly after the 2003 Billboard Music Awards, Fox's President of Entertainment acknowledged that the V-chip and television ratings were "underutilized." *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. On Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman). According to a 2003 study, parents' low level of V-chip use is explained in part by parents' unawareness of the device and the "multi-step and often confusing process" necessary to use it. Annenberg Public Policy Center, *Parents' Use of the V-Chip to Supervise Children's Television Use* 3 (2003). Only 27 percent of mothers in the study group could figure out how to program the V-Chip, and "many mothers who might otherwise have used the V-Chip were frustrated by an inability to get it to work properly." *Id.* at 4.

[160] *See supra* para. 18, n. 46; *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667-68 ¶ 37.

[161] *See supra* para. 18, n.46.

[162] Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) ("Kaiser Survey"). Likewise in a study published in the journal *Pediatrics*, parents

concluded that half of television shows the industry had rated as appropriate for teenagers were in fact inappropriate, a finding the study authors called "a signal that the ratings are misleading." David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 Pediatrics 1302, 1306 (2001).

Academics who have studied the television rating system share parents' assessment that the ratings are often inaccurate. A 2002 study found that many shows that should carry content descriptors do not, therefore leaving parents unaware of potentially objectionable material. *See* Dale Kunkel, *et al.*, *Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 Journal of Communications 112 (2002). For example, the study found that 68 percent of prime-time network shows without an "L" descriptor contained "adult language," averaging nearly three scenes with such language per show. *See id.* at 132; *see also id.* at 131 (finding that 20 percent of shows rated TV-G—supposedly appropriate for all ages— included objectionable language, including "bastard," "bitch," "shit," and "whore"). In fact, "in all four areas of sensitive material—violence, sexual behavior, sexual dialogue, and adult language—the large majority of programs that contain such depictions are not identified by a content descriptor." *Id.* at 136. The study's authors concluded that "[p]arents who might rely solely on the content-based categories to block their children's exposure to objectionable portrayals would be making a serious miscalculation, as the content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." *Id.*

A 2004 study also raised serious questions about the accuracy of television ratings. It found that there was more coarse language broadcast during TV-PG programs than those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe. Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 Journal of Broadcasting & Electronic Media 554, 563-64 (2004); *see also* Parents Television Council, *The Ratings Sham: TV Executives Hiding Behind A System That Doesn't Work* (April 2005) (study of 528 hours of television programming concluding that numerous shows were inaccurately and inconsistently rated); *Effectiveness of Media Rating Systems: Subcommittee of Science, Technology, and Space of the*

52. Broadcast television is also significantly different from the Internet. The Internet, unlike television, is not accessible to children "too young to read."[163] And parents who wish to control older children's access to inappropriate material can use widely available filtering software—an option that, whatever its flaws, lacks an

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Senate Comm. On Commerce, Science & Transp., 107th Congress (2004) (statement of Ms. Patti Miller, director, Children and the Media Program for Children Now) ("Can parents depend on the accuracy of the ratings systems? Sadly, the answer is no.").

An economist studying the question of why broadcasters consistently "underlabel" their programs concluded that they are likely responding to economic incentives. *See* James T. Hamilton, *Who Will Rate the Ratings?, in The V-Chip Debate: Content Filtering from Television to the Internet* 133, 143, 149 (Monroe E. Price, ed. 1998). He found that programs with more restrictive ratings command lower advertising revenues. *See id.* at 143. The desire to charge more for commercials and fear of "advertiser backlash" over shows with more restrictive ratings "means that networks have incentives to resist the provision of content-based information." *Id.* at 149; *see also* Kunkel, 52 Journal of Communications at 114 ("[T]he prospect that applying 'higher' ratings to a program could reduce audience size raises a self-interest concern regarding the accuracy with which judgments about program ratings are determined.").

Finally, even assuming *arguendo* that the content descriptors were accurately applied, they would not assist the majority of parents because they are not sufficiently understood. The Kaiser Survey found that only 51% of parents understand that "V" stands for violence; only 40% understand "L" stands for language; only 37% understand "S" stands for sex; and only 4% understand that "D" stands for suggestive or sexual dialogue. Kaiser Survey at 6.

[163] *Pacifica*, 438 U.S. at 749. *See, e.g., Youth, Pornography, and the Internet*, ed. by Dick Thornburgh and Herbert S. Lin, p. 115 (National Academy Press 2002) ("As a general rule, young children do not have the cognitive skills needed to navigate the Internet independently. Knowledge of search strategies is limited if not nonexistent, and typing skills are undeveloped.").

effective analog in the context of broadcast television[164] in light of the numerous problems with the V-chip and program ratings discussed above.[165]

53. *No Sanction Proposed.* For the reasons stated above, we conclude that "The 2003 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances, however, we propose no forfeiture here. We originally declined to propose a sanction in this case because the broadcast occurred prior to the *Golden Globe Awards Order*. As discussed above, we believe on further consideration that the complained-of language was actionable under Commission decisions preceding the *Golden Globe Awards Order*. Nevertheless, we still decline to propose a forfeiture here. To begin with, proposing a sanction would require issuance of a notice of apparent

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[164] *See Reno*, 521 U.S. at 877. Filtering software, for example, can block access to a website based on the software's evaluation of the site's content. The V-chip, in contrast, does not evaluate television programs itself and therefore is only effective if the programs have been given accurate ratings. However, to the extent that filtering software is ineffective and children are still able to access indecent material on the Internet, we note that Congress has sought to address this problem through the Child Online Protection Act, a statute whose validity is still being litigated. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming preliminary injunction). We note that the Networks also refer to the availability of video game consoles as another medium that, in their view, is as pervasive as television. *See Joint Comments* at 21-22. Video games differ from broadcast television in that games must be purchased individually, so a parent who purchases a video game console for a child retains the ability to determine which games the child will play.

[165] *See supra* para. 51 and nn. 159-162.

liability, which would not be "a further final or appealable order of the FCC," as required by the *Remand Order*.[166] In addition, even absent the requirement that we issue a "final or appealable order," we would not exercise our enforcement discretion to propose a forfeiture here given the limited remand under which we are proceeding. Accordingly, we find that no forfeiture is warranted in this case.[167] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context.

54. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).[168] We disagree with the Networks, how

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[166] *Remand Order* at 2. *See* 47 U.S.C. § 503(b)(4)(C); *ACT IV*, 59 F.3d at 1254, citing *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977).

[167] In light of recent legislation, the Networks raise the prospect of future fines in excess of $65 million for "a single, fleeting instance of indecent speech." *Joint Comments* at 16. We do not believe, however, that a case similar to "The 2003 Billboard Music Awards" arising in the future would merit the maximum fine permitted under the Broadcast Decency Enforcement Act. *See* Pub. L. 109-235, 102 Stat. 491 (June 15, 2006), *to be codified* at 47 U.S.C. § 503(b)(2)(C)(ii). While that Act, once we adopt implementing regulations, will provide the Commission with the flexibility to impose appropriate fines in egregious cases, the Commission will continue to follow a restrained enforcement policy in imposing forfeitures in this area.

[168] *See* 47 U.S.C. §§ 503(b)(1)(B) & (D). We also need not address whether responsibility would lie with independent Fox affiliates in addition to the licensees owned by Fox. *Cf. Complaints Against Va-*

ever, that Section 1464 is not violated unless a broadcaster acts with the state of mind required for a criminal conviction.[169] The Supreme Court has squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, explaining: "The legislative history of the provisions establishes their independence. As enacted in 1927 and 1934, the prohibition on indecent speech was separate from the provisions imposing civil and criminal penalties for violating the prohibition . . . Although the 1948 codification of the criminal laws and the addition of new civil penalties changed the statutory structure, no substantive change was apparently intended . . . Accordingly, we need not consider any question relating to the possible application of § 1464 as a criminal statute."[170] Thus, the *mens rea* necessary for a criminal conviction is not a prerequisite to the Commission's finding a Section 1464 violation.[171]

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rious Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19240-41 ¶ 25 (2004).

[169] *Joint Comments* at 24-26. We also reject, as contrary to the plain meaning of the Act, the Networks' contention that we may not impose forfeitures for violations of our indecency rule under section 503(b)(1)(B). While the Networks suggest that the Commission's indecency rule, 47 C.F.R. § 73.3999, merely represents a decision by the Commission to restate 18 U.S.C. § 1464, the indecency rule was adopted by the Commission pursuant to the direction of Congress. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949, Section 16 (1992).

[170] *Pacifica*, 438 U.S. at 739 n.13.

[171] The Networks' reliance on *FCC v. ABC*, 347 U.S. 284, 296 (1954), for the proposition that "'[t]here cannot be one construction for the

B. "The 2002 Billboard Music Awards"

55. *The Programming.* The Commission received a complaint alleging that WTTG(TV), Washington, DC, broadcast indecent material during "The 2002 Billboard Music Awards" program which aired at 8 p.m. Eastern Standard Time on December 9, 2002.[172] Specifically, the complainant alleged that while accepting an award, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."[173] The "2002 Billboard

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Federal Communications Commission and another for the Department of Justice'" is misplaced. *Joint Comments* at 24. In that case, the Court rejected the broad construction urged by the Commission of a statutory prohibition against a "lottery, gift enterprise, or similar scheme" in part because "the same construction would likewise apply in criminal cases." *FCC v. ABC*, 347 U.S. at 296. In contrast, the intent required to impose civil penalties for Section 1464 violations has no impact on its possible application as a criminal statute. *See Pacifica*, 438 U.S. at 739 n. 13.

[172] FCC File No. EB-03-IH-0460. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003). As noted in the *Golden Globe Awards Order*, the Commission's Enforcement Bureau had dismissed an earlier complaint concerning the same broadcast on the same station eight months earlier. *See* Letter from Charles Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to RadioEsq@aol.com, EB-02-IH-0861-MT (December 18, 2002), *cited in Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 n.32 (noting Bureau dismissal of complaint). However, Fox has raised no claim of administrative res judicata, and thus, because that defense has been waived, we need not consider it. *Cf. Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988).

[173] *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

Music Awards" was broadcast nationwide on the Fox Television Network.

56. Examination of a videotape of the broadcast reveals that Cher, a singer and actress, was presented with an "Artist Achievement Award" during "The 2002 Billboard Music Awards" program. Cher had been selected to receive this award at least three weeks before the broadcast.[174] In the course of her remarks accepting the award, she stated as follows: "I've had unbelievable support in my life and I've worked really hard. I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't."

57. Following the Second Circuit's remand, the Bureau sent Fox a letter of inquiry on September 7, 2006 concerning "The 2002 Billboard Music Awards" broadcast.[175] Fox responded on September 21, 2006.[176] Fox's response confirms that it broadcast the material described in the complaint.[177] Nevertheless, Fox argues that its broadcast of the "F-Word," in context, did not depict or describe sexual activities but rather, "at most,"

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[174] *See* Press Release, "Cher to Receive the Artist Achievement Award on the 2002 Billboard Music Awards Monday, Dec. 9 on Fox" (Nov. 14, 2002), attached to Letter from John C. Quale, Counsel of Fox, to Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, File No. EB-03-IH-0460 (September 21, 2006) ("Fox Response to 9/7/2006 LOI").

[175] *See* Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc., File No. EB-03-IH-0460 (September 7, 2006).

[176] *See* Fox Response to 9/7/2006 LOI.

[177] *Id.* at 2.

was a "vulgar expletive directed as an insult toward an individual or group against whom the speaker held deep-seated feelings of ill-will," and thus is outside the scope of the Commission's indecency definition.[178] Further, Fox argues that the complained-of material was not actionably indecent because it "contained at most the passing use of an expletive used to convey an insult," it "lasted only a couple of seconds out of a two-hour program," and Fox did not present it to pander to or titillate the audience, or for shock value.[179] Therefore, Fox contends that the dialogue is not actionably indecent.[180]

58. *Indecency Analysis.* With respect to the first prong of the indecency test, Fox contends that Cher's statement "fuck 'em" does not describe sexual activities and thus falls outside the scope of our indecency definition. We disagree. As discussed above, a long line of precedent indicates that both literal and non-literal uses of the "F-Word" come within the subject matter scope of our indecency definition.[181] Given the core meaning of the "F-Word," any use of that word has a sexual connotation.[182] Moreover, it hardly seems debatable that the word's power to insult and offend derives from its sexual

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[178] *Id.* at 10.

[179] *Id.*

[180] Fox also suggests that the complaint should be dismissed because it fails to specifically allege that the complainant viewed "The 2002 Billboard Music Awards." *See id.* at 2. We disagree. Our practice has never been to require such an allegation in order for a complaint to be considered. It is sufficient that the complaint originated from within the market of the station against which the complaint is filed. *See Indecency Policy Statement*, 16 FCC Rcd at 8015 ¶ 24; *see also Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30.

[181] *See supra* note 38.

[182] *See supra* para. 16.

meaning.[183] Here, for example, Cher's use of the "F-Word" to reference a sexual act as a metaphor to express hostility to her critics is inextricably linked to the sexual meaning of the term.[184] Accordingly, we conclude that, as we stated in *Golden Globe*,[185] its use falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

59. We will first address the first and third principal factors in our contextual analysis—the explicit or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. As we have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[186] Moreover, the gratuitous use of this language during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking. The complained-of material was broadcast in prime time, and the program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music

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[183] *See supra* note 40.

[184] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 224 (1994) (explaining the sexual meaning of the metaphorical use of the "F-Word" as a verb).

[185] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

[186] *See id.*

stars.[187] As in the case of "The 2003 Billboard Music Awards,"[188] a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2002 Billboard Music Awards" broadcast, 2,608,000 (27.9%) of the 9,361,000 people watching the program were under 18, and 1,186,000 (12.7%) were between the ages of 2 and 11. In addition, the program's TV-PG rating[189] would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[190] Furthermore, Fox does not argue that there was any justification for Cher's comment.[191] In light of all of these factors, we conclude that the first and third factors in our contextual analysis weigh in favor of a finding that the material is patently offensive.[192]

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[187] *See Pacifica*, 438 U.S. at 749-51 (identifying as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium). *See also supra* para. 18.

[188] *See supra* para. 18.

[189] Fox Response to 9/7/2006 LOI at 6.

[190] *See supra* n. 47. In the context of a broadcast rated "TV-PG," an "L" content description warning would not have alerted parents to the use of the "F-word." *See id.* Nonetheless, the "2002 Billboard Music Award," unlike the 2003 version of the same show, did not include even that inadequate "L" content descriptor. So parents relying on the ratings would not have expected even mild "coarse" language, much less the "F-Word."

[191] For instance, Fox does not contend that Cher's comment had any artistic merit or was necessary to convey any message.

[192] Fox's argument that it did not present Cher's comment for "shock value" misunderstands the contextual analysis employed by the Commission, under which "we examine the material itself and the manner

60. We next turn to the second factor in our contextual analysis—whether the complained-of material was sustained or repeated. Fox argues that this factor precludes a finding of indecency. As reviewed above, Commission dicta and Bureau-level decisions issued before our *Golden Globe* decision had suggested that expletives had to be repeated to be indecent but that such a repetition requirement would not apply to "descriptions or depictions of sexual or excretory functions." In this case, Cher did more than use the "F-Word" as a mere interjection or intensifier. Rather, she used the word to describe or reference a sexual act as a metaphor to express hostility to her critics. The fact that she was not literally suggesting that people engage in sexual activities does not necessarily remove the use of the term from the realm of descriptions or depictions. This case thus illustrates the difficulty in making the distinction between expletives on the one hand and descriptions or depictions on the other. Particularly in light of this lack of clarity, we acknowledge that it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast. This case also shows that the inquiry into whether a word is used an expletive rather than a description or depiction is wholly artificial. Whether used as an expletive, or as a description or depiction, the offensive nature of the "F-Word" is inherently tied to the term's sexual meaning.

61. In any event, under our *Golden Globe* precedent, the fact that Cher used the "F-Word" once does not remove her comment from the realm of actionable inde-

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in which it is presented, not the subjective state of mind of the broadcaster." *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6657-58 ¶ 12.

cency.[193] We stated in *Golden Globe* that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[194] To be sure, the fact that material is not repeated does weigh against a finding of indecency, and in certain cases, when all of the relevant factors are considered together, this factor may tip the balance in a decisive manner. This, however, is not one of those cases.

62. We believe that Cher's use of the "F-Word" here during a program aired in prime time was patently offensive under contemporary community standards for the broadcast medium. The patent offensiveness is compounded by the fact that the warnings accompanying the broadcast were inadequate and misleading.[195] We do not believe that the Commission should ignore "the first blow" to the television audience in the particular circumstances presented here.[196] Our determination, moreover, is consistent with the networks' own broadcast standards during the "safe harbor," which would not allow the broadcast of a single use of the "F-Word" under these circumstances.[197] Such standards reflect the networks' recognition that even a single use of the "F-Word" under most circumstances is not consistent with contemporary community standards for the broadcast medium. Indeed, Fox edited out Cher's comment in its broadcasts to the Mountain and Pacific Time Zones.

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[193] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12.

[194] *Id.*

[195] *See supra* para. 59.

[196] *Pacifica*, 438 U.S. at 748-49.

[197] *See supra* para. 29.

63. In sum, we conclude that, given the explicit, graphic, vulgar, and shocking nature of Cher's use of the "F-Word," Fox's broadcast was patently offensive under contemporary community standards for the broadcast medium.

64. Fox also argues that it should not be held responsible for airing Cher's comment. In particular, Fox argues that Cher's remarks were unscripted and that the five-second delay and editing system that it used for "The 2002 Billboard Music Awards" previously had been effective in preventing the airing of objectionable material.[198] We need not address these arguments, however, because we decide that it would not be equitable to sanction Fox for a different reason. Specifically, as discussed above, it was not clear at the time that broadcasters could be punished for the kind of comment at issue here.[199]

65. *Profanity Analysis.* Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that Cher's use of the "F-Word" in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[200] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nui-

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[198] *See* Fox Response to 9/7/06 LOI at 4-6, 10.

[199] *See supra* para. 60; *see also Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[200] 18 U.S.C. § 1464.

sance.'"[201] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[202] However, such circumstances are not present here: Fox does not contend that Cher's profane language was essential to informing viewers on a matter of public importance or that modifying the language would have had a material impact on its function as a source of news and information. On the contrary, Fox maintains that it attempted to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[203] It is undisputed that the "F-Word" was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination.[204] Because it was broadcast at a time of day when there was a reasonable risk of children's presence in the audience (indeed, as detailed above, over two-and-a-half million viewers of the broad-

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[201] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman*, 465 F.2d at 286.

[202] *Omnibus Order* at 2669 ¶ 19, *citing Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

[203] Fox Response to 9/7/2006 LOI at 10.

[204] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

cast were under the age of 18),[205] the broadcast is legally actionable.

66. *No Sanction Proposed.* For the reasons stated above, we conclude that "The 2002 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances, however, we find that no forfeiture is warranted in this case for the reason set forth above.[206] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context.[207]

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[205] *See supra* para. 59 (noting that, according to Nielsen ratings data, 27.9% of the people watching an average minute of "The 2002 Billboard Music Awards" broadcast were under 18, and 12.7% were between the ages of 2 and 11); *see also Pacifica*, 438 U.S. at 749-50 (discussing government's interest in protecting children from "offensive expression")

[206] *See supra* para. 64. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).

[207] The constitutional arguments raised by the Networks relating to the application of our indecency framework to "The 2002 Billboard Music Awards" are the same as the constitutional arguments that we have already addressed with respect to the "2003 Billboard Music Awards" broadcast. We reject those arguments for the same reasons given above. *See supra* para. 42-52.

C. "The Early Show"

67. "The Early Show" is a two-hour morning program that airs weekdays on the CBS Television Network. On December 13, 2004, the program devoted significant coverage to discussion of the CBS program "Survivor: Vanuatu," which had crowned its winner the prior evening. As part of that coverage, "The Early Show" co-host Julie Chen conducted a live interview with the final four contestants from "Survivor: Vanuatu." During that interview, Ms. Chen asked runner-up Twila Tanner whether she agreed with fourth-place finisher Eliza Orlins that Chris Daugherty, the winner of the program, would have prevailed had he been matched up in the finals against Ms. Orlins. Ms. Tanner then responded, "Not necessarily. I knew he was a bull-shitter from Day One."

68. A viewer subsequently filed a complaint with the Commission that Station KDKA-TV, Pittsburgh, Pennsylvania, which is licensed to CBS Broadcasting Inc., aired Ms. Tanner's comment at approximately 8:10 a.m. Eastern Standard Time, on December 13, 2004, and alleged that the comment was indecent and profane.[208] In response to the Commission's letter of inquiry, CBS does not deny that the comment in question was broadcast on KDKA-TV.[209] However, CBS argues, among other things, that the material is not actionable because it was spoken during a *bona fide* news interview.[210]

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[208] FCC File No. EB-05-IH-0007.

[209] *See* Letter From Robert Corn-Revere, Counsel to CBS, to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 (Sept. 21, 2006), at 1 ("CBS Response to 9/7/2006 LOI").

[210] *See id.* at 4.

69. In the *Omnibus Order*, we "recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee."[211] Indeed, when we denied an indecency complaint regarding material that was aired during "The Today Show," which is a competitor of "The Early Show," we reiterated the need for the Commission to exercise caution with respect to news programming.[212]

70. This restrained approach is consistent with a long line of Commission precedent. For example, in *Peter Branton*, the Commission held that an NPR news story on John Gotti, which included a wiretap of a conversation in which Gotti repeatedly used variations of the "F-Word," was not indecent because "it was an integral part of a bona fide news story."[213] The Commission explained that "we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners."[214]

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[211] *Omnibus Order*, 21 FCC Rcd at 2668 ¶ 15.

[212] *Id.* at 2717 ¶ 218.

[213] *Peter Branton*, 6 FCC Rcd at 610. *See Infinity Broadcasting Corp. of Pennsylvania*, Memorandum Opinion and Order, 3 FCC Rcd 930, 937 n. 31 (1987), *vacated on other grounds sub nom. ACT I*, (noting that "context will always be critical to an indecency determination and . . . the context of a bona fide news program will obviously be different from the contexts of the three broadcasts now before us, and, therefore, would probably be of less concern."); *Indecency Policy Statement*, 16 FCC Rcd at 8002-03 (stating that "[e]xplicit language in the context of a bona fide newscast might not be patently offensive.").

[214] *Peter Branton*, 6 FCC Rcd at 610.

71. In today's Order, we reaffirm our commitment to proceeding with caution in our evaluation of complaints involving news programming. To be sure, there is no outright news exemption from our indecency rules.[215] Nevertheless, in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming.

72. Some critics have questioned whether the segments of "The Early Show" devoted to "Survivor: Vanuatu" are legitimate news programming or instead are merely promotions for CBS's own entertainment programming.[216] CBS nevertheless maintains in its LOI response that its interview of the "Survivor: Vanuatu"

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[215] *See, e.g., Evergreen Media Corporation of Chicago AM*, Memorandum Opinion and Order, 6 FCC Rcd 5950, 5951 (Mass Media Bur. 1991) (finding talk show segment discussing pornographic photographs of Vanessa Williams to be indecent and concluding that "[e]ven if it had been argued that the [show] in question was comparable to a news program, the Vanessa Williams segment contained vulgar material presented in a pandering and titillating manner unlike anything found in the *Branton* case."); *Pacific and Southern Company Inc. (KSD-FM)*, Notice of Apparent Liability, 6 FCC Rcd 3689 (Mass Media Bur. 1990) (forfeiture paid) (finding that "exceptionally explicit and vulgar" material that was "presented in a pandering manner" was indecent even though it "arguably concerned an incident that was at the time 'in the news.'").

[216] *See, e.g.*, Howard Rosenberg, *The Fact Is, the Joke is the News*, Broadcasting & Cable, Nov. 1, 2004, at 32 ("Even more common is the venerable, widespread practice of cross-promotion, as on The Early Show, a production of CBS News, which each Friday devotes a lengthy segment to 'covering' the previous night's Survivor episode on the network, as if who got bumped off was an actual news story. As a bonus, The Early Show folds itself into this fantasy from a special set outfitted to resemble Survivor.").

contestants was a "*bona fide* news interview." "The Early Show" is produced by CBS News and addressed a variety of other topics that morning, including a suicide bombing in Iraq, the withdrawal of Bernard Kerik as a candidate to serve as Secretary of Homeland Security, and the apparent poisoning of then-Ukrainian opposition leader Viktor Yushchenko, which clearly fall under the rubric of news programming. In light of these factors and our commitment to exercising caution in this area, we believe it is appropriate in these circumstances to defer to CBS's plausible characterization of its own programming. Accordingly, we find that, in the *Omnibus Order*, we did not give appropriate weight to the nature of the programming at issue (i.e., news programming).

73. Turning to the specific material that is the subject of the complaint, we can certainly understand that viewers may have been offended by Ms. Tanner's coarse language. Nevertheless, given the nature of her comment and our decision to defer to CBS's characterization of the program segment as a news interview, we conclude, regardless of whether such language would be actionable in the context of an entertainment program, that the complained-of material is neither actionably indecent nor profane in this context. Accordingly, we deny the complaint.

D. "NYPD Blue"

74. As discussed above, the Commission received complaints regarding several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, and other unidentified ABC Television Network affiliates beginning at 9:00 p.m. Central Standard Time, in which

the "S-Word" was used.[217] In the *Omnibus Order*, the Commission found those broadcasts containing the "S-Word" to be apparently indecent and profane.[218] In its response to the Commission's letter of inquiry, KMBC Hearst-Argyle Television, Inc. ("Hearst"), licensee of KMBC-TV, does not dispute that it aired the complained-of material. Hearst argues, however, that the complaints should either be dismissed on procedural grounds or denied on the merits.

75. Raising an argument that we did not previously consider, Hearst contends that the Commission should dismiss the complaints as insufficient under the enforcement policy set forth in the *Omnibus Order*.[219] One complaint was filed against each of the "NYPD Blue" broadcasts at issue, and each of these complaints was filed by the same person. All of these complaints stated that the complained-of broadcast "originally aired at 9:00 p.m. CST on Kansas City affiliate KMBC" and was "also seen in homes across the country on ABC affiliates."[220] However, as Hearst accurately maintains, none of the complaints was filed by anyone residing in the market served by KMBC-TV. Nor were any of the complaints filed by anyone residing in a market where the complained-of material aired outside of the 10:00 p.m.-6:00 a.m. safe harbor. Instead, each complaint was filed by

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[217] FCC File No. EB-03-IH-0355.

[218] *Omnibus Order*, 21 FCC Rcd at 2696-98 ¶¶ 125-36.

[219] KMBC Hearst-Argyle Television, Inc. Response to Letter of Inquiry and Memorandum of Law, File No. EB-03-IH-0355 at 8 (Sept. 21, 2006) ("Hearst Response to 9/7/2006 LOI").

[220] *See* Letters from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC, to David Solomon, Chief, Enforcement Bureau, dated July 1 and July 3, 2003.

the same individual from Alexandria, Virginia, where, as Hearst points out,[221] the material was aired during the safe harbor.[222] In addition, none of the complaints contains any claim that the out-of-market complainant actually viewed the complained-of broadcasts on KMBC-TV or any other ABC affiliate where the material was aired outside of the safe harbor.[223] Thus, there is nothing in the record either to tie the complaints to Station KMBC-TV's local viewing area (or the local viewing area of any station where the material was aired outside of the safe harbor), or to suggest that the broadcast programming at issue was the subject of complaints from anyone who viewed the programming on any station that aired the material outside of the safe harbor.

76. We therefore agree with Hearst that we should dismiss the complaints regarding "NYPD Blue" pursuant to the enforcement policy that we announced in the *Omnibus Order*. There, the Commission stated that it would propose forfeitures only against licensees and stations whose broadcasts of actionable material were the subject of a viewer complaint filed with the Commission,[224] explaining that "[i]n the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that pro-

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[221] Hearst Response to 9/7/2006 LOI at 11, n.9.

[222] *See supra* note 217 and accompanying text. The letterhead of each complaint identified contact information for PTC's office in Alexandria, Virginia, as well as a PTC office in Los Angeles, California.

[223] *See id.*

[224] *Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32, 2676 ¶ 42, 2687 ¶ 86.

gram."[225] In addition to demonstrating appropriate restraint in light of First Amendment values, this enforcement policy preserves limited Commission resources, while still vindicating the interests of local residents who are directly affected by a station's airing of indecent and profane material.

77. Based on consideration of Hearst's arguments, we agree that consistent application of our restrained enforcement policy requires us to apply the same approach to this case that we applied to the notices of apparent liability in the *Omnibus Order*. While this case does not involve the imposition of forfeitures against KMBC-TV or any other licensee, the sufficiency of a complaint is the first step rather than the last step in the Commission's analysis. Thus, as Hearst puts it, "[o]nly the dismissal of the NYPD Blue complaints will bring [this case] into harmony with the Commission's announced enforcement policy."[226] Accordingly, we dismiss these complaints.

IV. ORDERING CLAUSES

78. Accordingly, IT IS ORDERED that Section III.B of the *Omnibus Order* is VACATED in its entirety.

79. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The 2003 Billboard Music Awards" and "The 2002 Billboard Music

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[225] *Id.* at 2687 ¶ 86. *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30 (under the enforcement policy announced in the *Omnibus Order*, "it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations.").

[226] Hearst Response to 9/7/2006 LOI at 11.

Awards" are GRANTED to the extent set forth herein and OTHERWISE DENIED.

80. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The Early Show" are DENIED.

81. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "NYPD Blue" are DISMISSED.

82. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Susan L. Fox, Esq., Vice President, Government Relations, The Walt Disney Company, 1150 17th Street, N.W., Suite 400, Washington, D.C. 20036.

83. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John W. Zucker, Esq., Senior Vice President, Law-Regulation, ABC, Inc., 77 West 66th Street, New York, N.Y. 10024.

84. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Seth Waxman, Esq., Counsel to The Walt Disney Company, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, 2445 M Street, N.W., Washington, D.C. 20037.

85. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Anne Lucey, Esq., Senior Vice President, Regulatory Policy, CBS Corporation, 601 Pennsylvania Ave., N.W., Suite 540, Washington, DC 20004.

86. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Re-

quested, to Robert Corn-Revere, Counsel to CBS Corp., Davis Wright Tremaine, LLP, 1500 K Street, N.W., Suite 450, Washington, D.C. 20005-1272.

87. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Mark J. Prak, Esq., Counsel to Hearst-Argyle Television, Inc., Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, 150 Fayetteville Street, Suite 1600 Wachovia Capitol Center, Raleigh, North Carolina 27601.

88. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Maureen A. O'Connell, Esq., News Corporation, 444 North Capitol Street, N.W., Suite 740, Washington, D.C. 20001.

89. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John Quale, Esq., Counsel to Fox Television Stations, Inc., Skadden, Arps, Slate, Meagher & Flom, LLP, 1440 New York Ave., N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING IN PART, DISSENTING IN PART

Re: Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Order

Today's *Order* is pursuant to a grant from the United States Court of Appeals for the Second Circuit of the Commission's voluntary remand request to reconsider portions of the March 15, 2006, *Omnibus Order*.[1] In that decision, I concurred in part and dissented in part because I believed the Commission had failed to develop a consistent and coherent indecency enforcement policy. It was my hope that the Commission would use this remand to clarify and rationalize our indecency regime,[2] but regulatory convenience and avoidance have prevailed instead. I am, therefore, compelled again to concur in part and dissent in part.

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[1] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*").

[2] Today's decision presumes that the general statement that the Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens," *and nothing more*, is sufficient to inform the public and broadcasters what we believe are the national, contemporary community standards of the broadcast medium. *In re Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004); *compare, Reno v. ACLU*, 521 U.S. 844 (1997) (finding the terms "indecent", "patently offensive" and "in context" were so vague that criminal enforcement would violate the fundamental constitutional principles, but while recognizing "the history of extensive government regulation of broadcasting").

The proverbial "elephant in the room" looming over today's decision is the *Golden Globe Awards Order*,[3] which inexplicably has been pending reconsideration for more than two and one-half years. While the Commission has simply refused to review the *Golden Globe* case, we have relied upon, expanded and applied it more than any other indecency case in the past two years. As the foundational basis for the Commission's decision in the cases involved in this remand, we should review and finalize this watershed decision.[4]

As I stated in the *Omnibus Order*, "by failing to address the many serious concerns raised in the *Golden Globe Awards* case, before prohibiting the use of additional words, we fall short of meeting the [appropriate] constitutional standard and walking the tightrope of a restrained enforcement policy."[5] Today, we fail again. Litigation strategy should not be the dominant factor guiding policy when First Amendment protections are at stake.

In its remand request, the Commission asked the Second Circuit for an opportunity to consider the concerns of broadcasters before issuing a final decision. Yet

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[3] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), *reversed*, 19 FCC Rcd 4975 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending* (since April 2004).

[4] *Golden Globe Awards Order* at ¶¶ 9, 12 and 14 (eviscerating our longstanding standard for "isolated or fleeting" expletives, establishing that any use of the "F-word" or a variation, in any context, "invariably invokes a coarse sexual image," and changing our 30-year standard of what constitutes profanity).

[5] *Omnibus Order*, Statement of Commissioner Jonathan S. Adelstein, concurring in part, dissenting in part, 21 FCC Rcd *at* 2726.

squandering this opportunity, the Commission fails to consider fully all concerns relating to an August 22, 2003, complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG(TV) in Washington, D.C. This *Order* does not adequately address the Enforcement Bureau's December 18, 2002, decision letter, which denied the same complaint on the merits.[6] No one filed either a petition for reconsideration or an application for review and, consequentially, the decision letter became a final order. It seems patently unfair for the Commission to re-adjudicate the same complaint, involving the same parties on the same cause of action, first in the initial decision letter, then in the *Omnibus Order*, and then again in today's *Order*. The Supreme Court has held that the principle of *res judicata* applies to an adjudicative administrative proceeding where the agency has properly resolved disputes of fact and the parties have had an adequate opportunity to litigate.[7] The Commission should not have re-adjudicated this complaint a second time in the *Omnibus Order*. Certainly today, the third time around, this complaint should be dismissed, or the Commission should reverse the Enforcement Bureau's decision letter and the resultant final order.

More broadly, today's *Order* notes that the Supreme Court in *Pacifica* stressed context and we have repeatedly said "the full context in which the material appeared is critically important." Yet the Commission's

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[6] The decision letter dismissing a complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG (TV), Washington, D.C., was referenced in footnote 32 of the *Golden Globe Awards Order*, and in footnote 9 of my Statement in that *Order*.

[7] *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 422 (1966).

analyses of the 2002 and 2003 broadcasts of "The Billboard Music Awards" are limited exclusively to a few seconds of a two-hour program. No consideration whatsoever is given to the entirety of the program. While it is perfectly reasonable to conclude that, after considering the entire program, the vulgarity and shock value of a particular scene permeated and dominated the program, the Commission should consider the totality of the program, rather than limit our consideration to an isolated programming segment.

Similarly, the Commission's justification for denying the complaint against the December 12, 2004, broadcast of "The Early Show," and reversing its indecency and profanity findings reflect the arbitrary, subjective and inconsistent nature of the Commission's decision-making.[8] In the *Omnibus Order*, the Commission concluded that the use of the s-word was shocking "*particularly* during a morning news interview,"[9] and that this "vulgarity in a morning television interview is *of particular concern* and *weighs heavily* in our analysis."[10] Today, without any legal support found in American jurisprudence, the Commission, *sua sponte*, creates a new "plausible"[11] standard to determine the threshold question of

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[8] In the *Omnibus Order*, with respect to "The Early Show," the Commission said: "In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance. We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here." *Omnibus Order*, ¶ 144.

[9] *See Omnibus Order*, 21 FCC Rcd at 2699 ¶ 141 [emphasis added].

[10] *Id.* [emphasis added].

[11] ¶ 72, supra.

whether a particular program segment qualifies as a "*bona fide* news interview."[12] While the Commission admits that "there is no outright news exemption from our indecency rules," it will nevertheless defer to a broadcaster's "plausible characterization of its own programming." I not only fail to find a legal basis for the Commission's latest invention,[13] I also fail to understand the justification for such a shift in reasoning. While the creation of this "infotainment" exception that can be invoked by a broadcaster's plausible characterization" may be convenient in this order today, it will surely create unintended consequences in future cases.

Even as applied, this new "plausible" standard is problematic. In this case, the CBS "Early Show" interview of contestants from the CBS program "Survivor: Vanuatu" was a cross promotion of a network's prime-time entertainment programming on the same network's morning show. It stretches the bounds to argue this is legitimate news or public affairs programming. It is unreasonable to say that the latest contestant to be voted off the island or the latest contestant to hear "you're fired" or even "come on down" is "serious public affairs programming."[14] The network creates its own "reality" on a reality show, and we are somehow to believe that developments within its own artificial world

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[12] *Id.* [emphasis in original].

[13] Looking at this contorted reasoning one must wonder whether the Commission is attempting to avoid reconsideration of its policy enunciated in the *Omnibus Order* that, consistent with *Golden Globe*, any variant, of the S-word is inherently excretory. *Omnibus Order* at 2699 ¶ 139.

[14] *Peter Branton*, 6 FCC Rcd 610 (1991).

are news? The only news here is how far this Commission is willing to stretch the definition of "news."

I also dissent in part from the Commission's decision to dismiss numerous complaints against several nationally televised episodes of the ABC network program "NYPD Blue" because the complaints did not come from viewers who resided in the station's media market. While the Commission has not changed its decision on the merits of the complaints, it has relied on an arbitrary procedural change in our enforcement policy that creates an unnecessary disconnect between the basis of our indecency authority and our enforcement policy, and encourages letter-writing campaigns, which will further burden Commission resources.

The Commission has long maintained, and does not now dispute, that we enforce a national, contemporary community standard, not a local one. For instance, in an effort to justify its authority in today's *Order*, the Commission observes that the broadcast medium has a "special nature" and "a uniquely pervasive presence in American life."[15] The Commission points out the "the Supreme Court emphasized the 'pervasive presence [of the broadcast medium] in the lives of all Americans' and that indecent broadcasts invade the privacy of the home."[16] Yet, the Commission's new enforcement policy is inconsistent with the national standard we impose and the pervasiveness of the medium we regulate.

This new enforcement policy is also inconsistent with the Commission's reasoning in other sections of today's *Order*. For example, as an important factor weighing in

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[15] *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[16] *See id.*, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970).

support of its finding that the 2002 and 2003 broadcasts of "The Billboard Music Awards" are indecent, the Commission cites Nielsen rating data on the total number of children under 18 and children between ages 2 and 11 who watched the programs, nationally. Yet based on our enforcement policy, the Commission will actually only protect children in the particular local media market where there is a complaint.[17]

The consequences of this new policy reveal its lack of logic. When the Commission determines a *national* network broadcast violates our *national* community standards, we will only fine the *local* station that has a complaint filed against it by a viewer in its media market. Although our obligation is to enforce the law to protect all children, we will only fine a local station that has the misfortune of being in a market where a parent or an adult made the effort to complain. This policy is misguided because a sufficient and valid complaint is truly the first, and an important, step in our indecency enforcement regime. The complaint and the complainant serve an important role, but the real party in interest is the Commission, acting on behalf the public, rather than the specific individual or organization that brings allegedly indecent material to our attention.

According to the new enforcement policy, even after we have determined the complained-of material is indecent, we will willfully blind ourselves to the potentially millions of children and households that watched the indecent program. The new policy would fine only the local station and only if the complainant is in its coverage area. Other stations will essentially be "sitting

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[17] *Order*, ¶¶ 18, 59 and 65.

ducks," waiting for an in-market viewer to file a complaint about the same program, in order for the Commission to act. I do not understand how we can say we are faithfully enforcing the law when we are aware of violations of the law that we simply choose to ignore.

This is not the restrained enforcement policy encouraged by the Supreme Court in *Pacifica*.[18] Restraint applies to the standard we use in our decision-making and the manner in which we decide what constitutes actionable, indecent material.[19] Restraint applies to the development of a coherent framework that is based on rational and principled distinctions.

The power to limit speech should be exercised responsibly, and with the utmost caution. While I agree

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[18] *Pacifica*, 438 U.S. at 763, POWELL J, *concurring in part and concurring in judgment.*

[19] The Commission claims that "the sufficiency of a complaint is the first step rather that the last step in the Commission's analysis." *Order*, ¶ 77. However, in the single complaint filed against the "The 2002 Billboard Music Awards," for example, the complainant does not even aver that she watched the program. Quite the contrary, the complaint was filed "on behalf of the Parents Television Council and its over 800,000 members." The complainant alleges, the broadcast "was seen in homes across the country on the Fox network, and in Washington DC." Based on the Commission's reasoning in today's *Order* and the *Golden Globe Awards Order*, this complaint does not state a *prima facie* case to justify Commission action. *See Order*, ¶¶ 40 and 65 (stating that "[i]n the *Golden Globe Awards Order*, the Commission concluded that the F-Word was profane within the meaning of Section 1464 because, in context, it contained vulgar and coarse language 'so grossly offensive to members of the public who *actually hear* it as to amount to a nuisance'") (emphasis added). *See also Order*, ¶ 75 (stating that complaints against "NYPD Blue" are justifiably dismissed because "none of the complaints contains any claim that the out-of market complainant actually viewed the complained-of broadcasts") (emphasis added).

with some aspects of today's *Order*, I respectfully cannot support our reasoning. For that reason, I concur in part and dissent in part.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-5358-ag

FOX TELEVISION STATIONS, INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

[Filed: Nov. 22, 2010]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of November, two thousand and ten.

Respondents Federal Communications Commission and United States of America having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ CATHERINE O'HAGAN WOLFE
CATHERINE O'HAGAN WOLFE, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 08-0841-ag (Lead), 08-1424-ag (Con),
08-1781-ag (Con) and 08-1966-ag (Con)

ABC, INC., KTRK TELEVISION, INC., WLS TELEVISION, INC., CITADEL COMMUNICATIONS, LLC, WKRN, G.P., YOUNG BROADCASTING OF GREEN BAY, INC., WKOW TELEVISION, INC., WSIL-TV, INC., ABC TELEVISION AFFILIATES ASSOCIATION, CEDAR RAPIDS TELEVISION COMPANY, CENTEX TELEVISION LIMITED PARTNERSHIP, CHANNEL 12 OF BEAUMONT INCORPORATED, DUHAMEL BROADCASTING ENTERPRISES, GRAY TELEVISION LICENSE , INCORPORATED , KATC COMMUNICATIONS , INCORPORATED , KATV LLC , KDN LICENSEE LLC , KETV HEARST-ARGYLE TELEVISION INCORPORATED, KLTV/KTRE LICENSE SUBSIDIARY LLC, KSTP-TV LLC, KSWO TELEVISION COMPANY INCORPORATED, KTBS INCORPORATED, KTUL LLC, KVUE TELEVISION INCORPORATED, MCGRAW-HILL BROADCASTING COMPANY INCORPORATED, MEDIA GENERAL COMMUNICATIONS HOLDINGS LLC, MISSION BROADCASTING INCORPORATED, MISSISSIPPI BROADCASTING PARTNERS, NEW YORK TIMES MANAGEMENT SERVICES, NEXSTAR BROADCASTING INCORPORATED, NPG OF TEXAS, L.P., OHIO/OKLAHOMA HEARST-ARGYLE TELEVISION INC., PIEDMONT TELEVISION OF HUNTSVILLE LICENSE LLC, PIEDMONT TELEVISION OF SPRINGFIELD

LICENSE LLC, POLLACK/BELZ COMMUNICATION COMPANY , INC. , POST-NEWSWEEK STATIONS SAN ANTONIO INC ., SCRIPPS HOWARD BROADCASTING CO., SOUTHERN BROADCASTING INC., TENNESSEE BROADCASTING PARTNERS, TRIBUNE TELEVISION NEW ORLEANS, INC., WAPT HEARST-ARGYEL TELEVISION, INC., WDIO- TV LLC, WEAR LICENSEE LLC, WFAA- TV INC., WISN HEARST-ARGYLE TELEVISION INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS,

FOX TELEVISION STATIONS, INC., NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., CBS BROADCASTING INC., INTERVENORS.

SUMMARY ORDER

PRESENT: RICHARD C. WESLEY, DEBRA A. LIVINGSTON, Circuit Judges, JANE A. RESTANI,* Judge.

Petition for review of a forfeiture order of the Federal Communications Commission. **UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the petition for review be **GRANTED** and the forfeiture order of the Federal Communications Commission ("FCC") be **VACATED.**

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* The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

ABC, Inc. ("ABC") and the ABC Television Affiliates Association and ABC-affiliated television stations (collectively, "ABC Affiliates") petition for review of an order of the FCC determining that an episode of the ABC Television Network show *NYPD Blue* violated broadcast indecency standards because it depicted a woman's nude buttocks and imposing a forfeiture penalty against forty-four ABC-affiliated television stations. *See Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue"*, 23 FCC Rcd. 3147, 3147–48, 3171-75 (2008) ("*Forfeiture Order*"). Petitioners, supported by Intervenors Fox Television Stations, Inc. ("Fox"), NBC Universal, Inc. ("NBC"), NBC Telemundo License Co. ("Telemundo"), and CBS Broadcasting Inc., raise administrative and constitutional challenges to the *Forfeiture Order*.[1] Because *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2d Cir. 2010) (rehearing en banc denied), held that the indecency policy under which the *Forfeiture Order* was issued is unconstitutionally vague, we grant the petition for review and vacate the *Forfeiture Order*.

BACKGROUND

On February 25, 2003 at 9:00 p.m. in the Central and Mountain time zones, the ABC Television Network aired an episode of *NYPD Blue* that depicted an adult woman's nude buttocks for slightly less than seven seconds.[2]

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[1] Amici curiae Center for Creative Voices in Media and Future of Music Coalition support Petitioners. Amici curiae Decency Enforcement Center for Television, Morality in Media, Inc., and Parents Television Council support Respondents, the FCC and the United States.

[2] The episode began with a warning that "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY.

Forfeiture Order, 23 FCC Rcd. at 3147-48 ¶¶ 2-3; *NYPD Blue: Nude Awakening*. In the episode, Connie McDowell (played by Charlotte Ross), who has recently moved in with Andy Sipowicz, disrobes as she prepares to shower, and her nude buttocks are visible. *Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue"*, 23 FCC Rcd. 1596, 1598-99 ¶¶ 9–10 (2008) ("*NAL*"); *NYPD Blue: Nude Awakening*. As McDowell turns toward the shower, the side of her buttocks and the side of one of her breasts are visible. *NAL*, 23 FCC Rcd. at 1599 ¶ 9. While she faces the shower, the camera pans down, again revealing her nude buttocks. *Id.* at 1599 ¶ 10. Sipowicz's young son, Theo, enters the bathroom and sees McDowell naked from the front. *See NAL*, 23 FCC Rcd. at 1599 ¶ 10; *NYPD Blue: Nude Awakening*. Theo blocks the audience's view of McDowell's nudity. *Id.* Each character reacts with embarrassment, and Theo leaves the room and apologizes. *Id.* McDowell, covering her breasts and pubic area, responds, "It's okay. No problem." *Id.* According to ABC and the ABC Affiliates, the scene was included to portray the awkwardness between a child and his parent's new romantic partner and their difficulties in adjusting to life together.

The FCC received indecency complaints regarding the episode, and in January 2008 the FCC issued a notice of apparent liability for forfeiture ("NAL") to ABC and the ABC Affiliates proposing the maximum forfeiture penalty of $27,500 against each station. *NAL*, 23 FCC Rcd. at 1596, 1601 ¶ 18, 1602 ¶ 23. In February

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VIEWER DISCRETION IS ADVISED." *NYPD Blue: Nude Awakening* (ABC television broadcast Feb. 25, 2003).

2008, the FCC issued the *Forfeiture Order*, determining that the depiction of the buttocks was indecent and imposing a penalty of $27,500 on each of forty-four ABC-affiliated stations. *See* 23 FCC Rcd. at 3147 ¶¶ 1-2, 3171–75. ABC and the ABC Affiliates petition this Court for review of the *Forfeiture Order*.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). Under the APA, we may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] contrary to constitutional right. . . . " 5 U.S.C. § 706(2)(A)–(B). "We review an agency's disposition of constitutional issues *de novo*." *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 91 (2d Cir. 2009).

DISCUSSION

Under 18 U.S.C. § 1464, "[w]hoever utters any obscene, indecent, or profane language by means of radio communication" is subject to a criminal penalty. 18 U.S.C. § 1464. A regulation pursuant to that statute provides that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent." 47 C.F.R. § 73.3999(b). The FCC may impose a forfeiture penalty when it determines that a licensee has violated 18 U.S.C. § 1464. 47 U.S.C. § 503(b)(1)(D). The FCC defines indecent material as "describ[ing] or depict[ing] sexual or excretory organs or activities" and "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Industry*

Guidance on the Comm'ns Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999, 8002 ¶¶ 7-8 (2001). In determining whether material is patently offensive, the FCC looks to three principal factors:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

Id. at 8002 ¶ 10. The context in which the material appears "is critical." *Id.*

Speech "which is indecent but not obscene," however, "is protected by the First Amendment." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The First and Fifth Amendments protect speakers "from arbitrary and discriminatory enforcement of vague standards" in laws and regulations. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). Standards are unconstitutionally vague if they do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . " *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "The First Amendment places a special burden on the government to ensure that restrictions on speech are not impermissibly vague." *Fox*, 613 F.3d at 327.

In *Fox*, a panel of this Court struck down the FCC's indecency policy, holding that it violates the First Amendment because it is unconstitutionally vague. *Id.*

at 319, 330. The FCC and the United States concede that *Fox* "invalidated the [FCC]'s indecency policy in its entirety." Supplemental Br. for FCC and United States 3. Although they contend that the facts of this case are different from those of *Fox*, the FCC and the United States correctly recognize that "*Fox* does not turn on [factual] distinctions."[3] *Id.*

Indeed, there is no significant distinction between this case and *Fox*. In *Fox*, the FCC levied fines for fleeting, unscripted utterances of "fuck" and "shit" during live broadcasts. *Id.* at 322. Although this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found "impermissibly vague." *Id.* at 327. According to the FCC, "nudity itself is not *per se* indecent." *WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion & Order, 15 FCC Rcd. 1838, 1841 ¶ 11 (2000). The FCC, therefore, decides in which contexts nudity is permissible and in which contexts it is not pursuant to an indecency policy that a panel of this Court has determined is unconstitutionally vague. *Fox*, 613 F.3d at 332.

Fox's determination that the FCC's indecency policy is unconstitutionally vague binds this panel. *See United States v. Jass*, 569 F.3d 47, 58 (2d Cir. 2009). Accord-

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[3] Only amicus curiae Parents Television 3 Council argues that this case is distinguishable from *Fox*. The Parents Television Council alleges that *Fox*'s holding "is restricted to FCC's fleeting expletive policy as it relates to live, unscripted broadcasts." Supplemental Br. for Parents Television Council at 4. Although certainly the facts of *Fox* relate to live, unscripted broadcasts, *Fox* clearly sweeps more broadly, holding that the "current policy fails constitutional scrutiny." *Fox*, 613 F.3d at 335.

ingly, we need not reach the administrative law or other constitutional challenges Petitioners raised.[4]

CONCLUSION

For the foregoing reasons, the petition for review is **GRANTED** and the forfeiture order of the FCC is hereby **VACATED**.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of the Court

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[4] Because the constitutional issue is decided, the "fundamental and longstanding principle of judicial restraint" that "requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988), is not implicated.

APPENDIX E

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File Nos. EB-03-IH-0122 and EB-03-IH-0353[1]

IN THE MATTER OF
COMPLAINTS AGAINST VARIOUS TELEVISION
LICENSEES CONCERNING THEIR FEBRUARY 25, 2003
BROADCAST OF THE PROGRAM "NYPD BLUE"

Adopted: Feb. 19, 2008
Released: Feb. 19, 2008

FORFEITURE ORDER

By the Commission: Commissioner McDowell issuing a statement.

I. INTRODUCTION

1. In this Forfeiture Order, issued pursuant to section 503 of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,[2] we find that ABC Television Network ("ABC") affiliated stations and ABC owned-and-operated stations listed in Attachment A, *infra*, broadcast indecent material during

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[1] The NAL Acct. No. and FRN number for each licensee subject to this Forfeiture Order are listed in Attachment A, *infra*.

[2] *See* 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

an episode of the program *NYPD Blue* on February 25, 2003, in willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.[3] Based on our review of the facts and circumstances in this case, we conclude that each station is liable for a forfeiture in the amount of $27,500.

II. BACKGROUND

2. *NYPD Blue* was a weekly, hour-long program that ran on the ABC Television Network from 1993 through 2005. The Commission received numerous complaints alleging that certain affiliates of ABC and ABC owned-and-operated stations broadcast indecent material during the February 25, 2003 episode of *NYPD Blue* that aired at 9:00 p.m. in the Central and Mountain Standard Time Zones. After reviewing the complaints, the Enforcement Bureau (the "Bureau") sent a letter of inquiry to ABC on February 3, 2004.[4] As a result of its investigation, the Bureau received a response from ABC and a tape of the episode.[5]

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[3] *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

[4] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Susan L. Fox, ABC, Inc., dated February 3, 2004 ("*LOI*").

[5] *See* Letter from Susan L. Fox, ABC, Inc., to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 9, 2004; Letter from John W. Zucker, Senior Vice President, Law and Regulation, ABC, Inc., and Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 17, 2004 ("*February 17 Response*").

3. ABC's response to the Bureau's letter of inquiry confirmed the inclusion in the program of a scene, referenced in the complaints, in which a woman and a boy, who plays the eight-year old son of another character on the show, are involved in an incident that includes adult female nudity.[6] Specifically, the woman's naked buttocks and a portion of her breasts were depicted in a scene in which she is shown disrobing and preparing to take a shower, and the boy unexpectedly enters the bathroom.[7] ABC also confirmed that 52 of the stations about which we had received complaints aired the material outside the "safe harbor."[8] In its responses to the letters of inquiry, ABC argued, without citing any authority, that the buttocks are not a sexual or excretory organ.[9] ABC conceded that the scene included back and side nudity, but contended that it was "not presented in

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[6] *See Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* Notice of Apparent Liability for Forfeiture, FCC 08-25, at ¶¶ 9-10 (rel. January 25, 2008) ("*NAL*").

[7] *See id.*

[8] The "safe harbor" is that part of each day between 10:00 p.m. and 6:00 a.m. in which indecent programming may be broadcast. *See* 47 C.F.R. § 73.3999(b) (stating that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6:00 a.m. and 10:00 p.m. any material which is indecent.")

[9] *See February 17 Response* at 7.

a lewd, prurient, pandering, or titillating way."[10] ABC further asserted that the purpose of the scene was to "illustrate[ ] the complexity and awkwardness involved when a single parent brings a new romantic partner into his or her life," and that the nudity was not included to depict an attempted seduction or a sexual response from the young boy.[11] ABC also asserted that, because of the "modest number of complaints" the network received, and the program's generally high ratings, the contemporary community standards of the viewing community embrace, rather than reject, this particular material.[12]

4. On January 25, 2008, the Commission released the Notice of Apparent Liability for Forfeiture ("*NAL*"), finding that the material at issue apparently violated the broadcast indecency standard. Applying its two-prong indecency analysis, the Commission first found that the material depicted sexual or excretory organs or activities.[13] The Commission then concluded that the material, in context, was patently offensive as measured by contemporary community standards for the broadcast medium and thus satisfied the second prong of our indecency standard. In reaching this conclusion, we re-

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[10] *See id.* at 9.

[11] *See id.* at 3-4, 9-11.

[12] *See id.* at 9.

[13] *See NAL* at ¶ 11.

viewed each of the three principal factors relevant to a finding of patent offensiveness under our contextual analysis of indecency cases. We first determined that the material presented in the episode "contains explicit and graphic depictions of sexual organs."[14] Turning to the second principal factor in our patent offensiveness inquiry, the Commission found "that the broadcast dwells on and repeats the sexual material."[15] Finally, the Commission concluded that the material was shocking and titillating, explaining, among other things, that "the scene's depiction of adult female nudity, particularly the repeated shots of a woman's naked buttocks, is titillating and shocking."[16]

5. Accordingly, the *NAL* found the licensees of 52 stations that broadcast the episode apparently liable for forfeitures in the amount of $27,500 per station for broadcasting indecent material, in apparent willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules. In response to the *NAL*, numerous letters and pleadings were filed with the Commission.[17]

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[14] *Id.* at ¶ 12.

[15] *Id.* at ¶ 13.

[16] *Id.* at ¶ 14.

[17] *See* Attachment B, *infra*, for a list of these submissions. To the extent that any of the submissions sought an extension of time within which to file a substantive response to the *NAL*, those requests are

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with section 503(b) of the Communications Act,[18] section 1.80 of the Commission's Rules,[19] and the Commission's forfeiture guidelines set forth in its *Forfeiture Policy Statement*.[20] In assessing forfeitures, section 503(b) of the Act requires that we take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters as justice may require.[21] As discussed further below, we have examined the licensees' responses to the *NAL* pursuant to the aforementioned statutory factors, our rules, and the *Forfeiture Policy Statement*, and, with the exception of the seven stations listed in paragraph 56 hereof, we find no basis for cancellation or reduction of the forfeiture.

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hereby denied for the reasons discussed below in Section III.B.2 of this Order.

[18] *See* 47 U.S.C. § 503(b).

[19] *See* 47 C.F.R. § 1.80.

[20] *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

[21] *See* 47 U.S.C. § 503(b)(2)(D).

A. Application of Indecency Test to *NYPD Blue*

7. Indecency findings involve two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition, *i.e.*, "the material must describe or depict sexual or excretory organs or activities."[22] In the *NAL*, the Commission concluded that the programming at issue here is within the scope of our indecency definition because it depicts sexual and excretory organs, specifically, an adult woman's buttocks.[23] ABC and the ABC Affiliates contest this finding, arguing that the buttocks are not sexual or excretory organs and thus are outside the scope of indecency regulation. Relying primarily on medical texts, the ABC Affiliates argue that sexual organs are "biologically defined" as the genitalia or reproductive organs that are involved in reproduction.[24] Similarly, they argue that excretory organs include only the organs of the excretory system that eliminate urine and other waste products of metabolism, and that the "[t]he only external organs or structures of the

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[22] *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 ¶ 7 (2001) (*"Indecency Policy Statement"*).

[23] *See NAL* at ¶ 11.

[24] *See* ABC Affiliates Response at 36-37.

excretory system are the penis in males, and the urethral opening in females, which appears between the walls of the labia."[25] ABC argues that the buttocks are not an excretory or sexual organ because they do not have a sexual or excretory physiological function.[26] In addition, both argue that the precedents cited in the *NAL* are inapposite and that the Commission has never treated mere depictions of naked buttocks as within the scope of its indecency definition.[27] All of these arguments lack merit.

8. The Commission has consistently interpreted the term "sexual or excretory organs" in its own definition of indecency as including the buttocks, which, though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal and closely associated by most people with excretory activities.[28]

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[25] *Id.* at 37-38.

[26] *See* ABC Response at 15-16.

[27] *See* ABC Response at 16-21; ABC Affiliates Response at 39-44.

[28] *See, e.g., Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2681 ¶ 62, 2718 ¶ 225 (2006) (*Omnibus Order*) (finding buttocks are sexual and excretory organs within the subject matter scope of indecency definition); *Entercom Kansas City License, LLC*, Notice of Apparent Liability for Forfeiture, 19 FCC FCC Rcd 25011 ¶ 7 (2004) (comments concerning contestants' genitals, buttocks and breasts describe or depict sexual or excretory organs); *Rubber City Radio Group*, Notice of Ap-

Thus, the Commission has in many cases treated naked buttocks as coming within the scope of its indecency definition, even though it has not always concluded that particular depictions or descriptions were patently offensive and thus actionably indecent.[29]

9. The indecency standard that we are applying here was formulated by the Commission to enforce 18 U.S.C. § 1464 through administrative action.[30] The Commission has broad discretion to interpret and apply the standards and terminology it has developed, as long as it does so in a manner that is consistent with the stat-

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parent Liability for Forfeiture, 17 FCC Rcd 14745, 14747 ¶ 6 (Enf. Bur. 2002) (dialogue in complaint referring to a "baby's ass" referred to a child's excretory organ and thus came within the first prong of the indecency definition).

[29] *See id.* Similarly, the Commission also has consistently treated female breasts as sexual organs though, like the buttocks, they are not physiologically necessary to procreation. *See, e.g., Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show,* Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230 (2004) ("*Super Bowl NAL*"), *affirmed,* Forfeiture Order, 21 FCC Rcd 2760 (2006) ("*Super Bowl Forfeiture Order*"), *affirmed,* Order on Reconsideration, 21 FCC Rcd 6653 (2006), ("*Super Bowl Order on Reconsideration*"), on *appeal sub nom. CBS Corp. v. FCC*, No. 06-3575 (3d Cir. 2006).

[30] *See* 47 U.S.C. § 503(b)(1)(D).

ute and the Constitution.[31] In the context of interpreting and applying the statutory and regulatory proscription against indecent programming, it is appropriate to interpret these terms not in a medical sense but rather in the sense of organs that are closely associated with sexuality or excretion and that are typically kept covered because their public exposure is considered socially inappropriate and shocking.[32] We believe that it is ap

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[31] *See, e.g., Udall v. Tallman*, 380 U.S. 1, 16 (1965) (Court "shows great deference to the interpretation given the statute by the agency charged with its administration. . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."); *Dana Corp. v. ICC*, 703 F. 2d 1297, 1300 (D.C. Cir. 1983) ("The [ICC] has not violated its own rules, given the broad discretion it is accorded in interpreting them"); *Solite Corp. v. EPA*, 952 F. 2d 473, 497 (D.C. Cir. 1991) ("EPA's determination . . . was thus the result of the Agency's interpretation and application of its own rules, and the interpretation was far from 'plainly wrong'"); *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1538-39 (D.C. Cir. 1989) ("[a]n agency's interpretation of its own regulations will be accepted unless it is plainly wrong"); *General Carbon Co. v. OSHRC*, 860 F.2d 479, 483 (D.C. Cir. 1988) ("petitioner, in asserting that the agency has misconstrued its own standards, has assumed a heavy burden. . . . This court has previously noted 'the high level of deference to be afforded an agency on review when the issue turns on the interpretation of the agency's own prior proclamations.").

[32] Under the "nuisance" rationale upheld by the Supreme Court in *Pacifica*, it is appropriate to treat as coming within the scope of the indecency definition those body parts that are considered socially inap-

propriate to use the terms sexual or excretory organs—as we have in the past—in a manner consonant with the purpose of the regulatory regime to protect children from indecent depictions of organs associated with sex and excretion and sexual and excretory activities. The purpose of indecency regulation, obviously, is not to regulate procreation or excretion, so we do not think a technical physiological definition is appropriate.[33]

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propriate to reveal in public for "[a]s Mr. Justic Sutherland wrote a 'nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) ("*Pacifica*"). Under its nuisance approach, the Commission has determined that daytime and primetime broadcast programming is the "wrong place" to display naked buttocks in a patently offensive manner.

[33] Indeed, the arguments presented by the ABC Affiliates demonstrate the absurdity of employing a technical physiological definition in the context of indecency regulation. First, the ABC Affiliates maintain, from a medical standpoint, that the skin is an excretory organ because it excretes perspiration. *See* ABC Affiliates Response at 37 & n.42. But it is preposterous to suggest that any display of skin falls within the subject matter scope of our indecency regulation, and the ABC Affiliates even disclaim the logical consequence of their own argument, stating that the "ABC Affiliates do not believe that the Commission intends . . . to proscribe depictions of skin as an excretory organ." *Id.* Such a concession indicates that the ABC Affiliates do not seriously believe their own argument—that the subject matter scope of our indecency regulation is to be determined through technical physiological

10. Moreover, if we interpreted these terms in the narrow physiological sense advocated by ABC and the ABC Affiliates, the airwaves could be filled with naked buttocks and breasts during daytime and prime time hours because they would be outside the scope of indecency regulation (at least if no sexual or excretory activities were shown or discussed). We find it impossible to believe that ABC or the ABC Affiliates ever thought this to be the Commission's policy. In short, while their Responses to the *NAL* are brimming with medical definitions and arguments, the respondents offer no legal or public policy reason for their argument, and we find it lacking in merit.

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definitions. Second, the ABC Affiliates draw a distinction between excretion, which they claim refers to the elimination of the waste products of metabolism from the body, and defecation, which refers to the elimination of feces, "undigested food and bacteria [that] have never been a part of the functioning of the body." *Id.* at 38. Thus, pursuant to the technical physiological definitions presented by the ABC Affiliates, sweating would be considered an "excretory activity" while defecating would not. Again, such an approach makes no sense in the context of indecency regulation, and no reasonable person would believe that the Commission would use such technical definitions in the context of indecency regulation. We note, for instance, that according to the logic of the ABC Affilates, two of the seven "Filthy Words" in the Carlin monologue at issue in *Pacifica*—"shit" and "tits"—would appear not to fall within the subject matter scope of our indecency definition.

11. Contrary to the ABC Affiliates' contention, the "rule of lenity" does not require that the Commission construe the indecency proscription in section 1464 narrowly even when it is imposing administrative sanctions for violations.[34] The Supreme Court made clear in *FCC v. Pacifica* that the removal of the indecency provision from the Communications Act and its codification in section 1464 of the criminal code in 1948 was not intended to effect any "substantive change."[35] The Court thus found it unnecessary to "consider any question relating to the possible application of § 1464 as a criminal statute."[36] It is similarly unnecessary here—all the more so because the term we are construing is one that appears in the standard formulated by this Commission for purposes of imposing administrative forfeitures.

12. Turning to the second aspect of our indecency test, we also find that, in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium. In our analysis of the three principal factors involved in determining whether material is patently offensive, "the overall context of the broadcast in which the disputed material appeared is critical. Each

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[34] *See* ABC Affiliates Response at 44-45.

[35] *Pacifica*, 438 U.S. at 739 n.13.

[36] *Id.*

indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent."[37] Each of the three principal factors contributes to a finding of patent offensiveness here. ABC points to factors that, it argues, mitigate the patent offensiveness of the disputed material, in particular the *NYPD Blue* series' "outstanding artistic and social merit," the relationship of the scene in question to a theme stretching across multiple episodes, and the parental advisory and rating at the beginning of the episode.[38] On balance, however, for the reasons discussed below, we find that the material is patently offensive as measured by contemporary community standards for the broadcast medium.

13. First, we find that the depiction of an adult woman's naked buttocks was sufficiently graphic and explicit to support an indecency finding. Indeed, we do not believe that the explicit and graphic nature of the material is reasonably debatable. Although the language-based

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[37] *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10. *See id.* at 8002-8003 ¶ 9 ("contextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material.").

[38] *See* ABC Response at 26; ABC Affiliates Response at 51-52, 54-55, 61-62.

examples that it provides are not entirely apposite, examination of the *Indecency Policy Statement* reveals that, in a case such as this one, the issue under the first principal factor is whether the visual depiction of the sexual or excretory organ is clear and unmistakable.[39] Here, the scene in question shows a female actor naked from behind, with her buttocks fully visible at close range. She is not wearing a g-string or other clothing, nor are the shots of her buttocks pixillated or obscured.[40] Thus, the material is sufficiently graphic and explicit to support an indecency finding.[41] Although the partial views of her naked breast from behind and from the side are not sufficiently graphic and explicit, in and

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[39] *See Indecency Policy Statement*, 16 FCC Rcd at 8004-8008 ¶¶ 13-16.

[40] *Cf. Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920, 1927 ¶ 9 (2005) ("*PTC I*") (material that involved "characters whose sexual and/or excretory organs were covered by bedclothes, household objects, or pixilation" but did not "actually depict[ ] sexual or excretory organs" held not sufficiently graphic or explicit to support a patent offensiveness finding).

[41] *See Super Bowl Forfeiture Order*, 21 FCC Rcd at 2765-66 (broadcast of a female performer's breast was graphic and explicit); *Young Broadcasting of San Francisco*, Notice of Apparent Liability, 19 FCC Rcd 1751 (2004) (broadcast of performer's exposed penis was graphic and explicit).

of themselves, to support an indecency finding, they also add somewhat to the first factor's weight here.

14. The cases cited by the ABC Affiliates for the proposition that nudity is not necessarily graphic or explicit are easily distinguishable from this case.[42] ABC cites cases in which the Commission did not find depictions of naked buttocks to be patently offensive, but none held that the clear and unmistakable depiction of nudity was not sufficiently explicit to support a finding of patent offensiveness.[43] Rather, each held that the material at issue, in light of all of the relevant factors, was not patently offensive.[44] We emphasize that our finding with respect to explicitness does not represent a conclusion that the scene in question is pandering or titillating; that issue relates to our analysis of the third

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[42] *See* ABC Affiliates Response at 47. *See Omnibus Order* at 2716 ¶ 215 (scene from *The Today Show* was not graphic or explicit where "[t]he shot of the man's penis is not at close range, and the overall focus of the scene is on the rescue attempt, not on the man's sexual organ"); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1931, 1938 ¶ 9 (2005) ("*PTC II*") ("rudimentary depiction of a cartoon boy's buttocks" was not sufficiently graphic or explicit to support a patent offensiveness finding).

[43] *See* ABC Response at 18-19.

[44] *See id.*

principal factor below. We simply conclude here that the disputed material's clear, unobscured, close-range visual depiction of a woman's buttocks was graphic and thus supports a finding of patent offensiveness.

15. Second, we find that the disputed material's repeated depictions of a woman's naked buttocks provide some support for a patent offensiveness finding. As set forth in the *Indecency Policy Statement*, the issue under the second principal factor is focus and repetition versus "passing or fleeting" reference to sexual or excretory material.[45] Here, the disputed scene includes repeated shots of a woman's naked buttocks and focuses on her nudity. At one point, when her buttocks already have been displayed once and she is about to step into the shower, the camera deliberately pans down her back to reveal another full view of her buttocks before panning up again. While we concede that a longer scene or additional depictions of nudity throughout the episode would weigh more heavily in favor of an indecency finding, we conclude here that the focus on and repeated shots of the woman's naked buttocks provides some support for a finding of indecency under the second factor.[46] In this regard, it is worth noting that our analysis under this factor is best viewed on a continuum rather than as a

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[45] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17.

[46] *See id.*

binary "all or nothing" determination. To be sure, the depiction here is not as lengthy or repeated as some of the cases cited by ABC and ABC Affiliates in which the Commission has indicated that this factor supported a finding of patent offensiveness (and thus does not provide as much support for a finding of patent offensiveness as was present in those cases).[47] However, this material does contain more shots or lengthier depictions of nudity, or more focus on nudity, than other cases involving nudity where the Commission has found that this factor did not weigh in favor of a finding of patent offensiveness.[48]

16. Third, we find that the scene's pandering, titillating, and shocking nature supports a patent offensiveness finding. The female actor's nudity is presented in a manner that clearly panders to and titillates the audience. The viewer is placed in the voyeuristic position of viewing an attractive woman disrobing as she prepares to step into the shower. Moreover, not only does the

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[47] *See* ABC Response at 21-24; ABC Affiliates Response at 48-50.

[48] In any event, even were we to conclude that the second principal factor in our contextual analysis does not support a finding a patent offensiveness, we would still reach the same conclusion based on the strength of the first and third principal factors. *See, e.g., Super Bowl Forfeiture Order*, 21 FCC Rcd at 2766 ¶ 12; *Young Broadcasting of San Francisco*, 19 FCC Rcd at 1755 ¶¶ 10, 12 (broadcast of performer's exposed penis was graphic and explicit).

scene include a shot of her naked buttocks as she removes her robe in front of the bathroom mirror, the scene goes farther, providing the audience with another full view of her naked buttocks as she stands in front of the shower. This second shot, in which the camera pans down her naked back to her buttocks, pauses for a moment and then pans up her back, highlights the salacious aspect of the scene, clearly suggesting that its interest lies at least partly in seeing the actress's naked buttocks. The subsequent camera shots of the boy's shocked face from between the woman's legs, and of her naked, partially-obscured upper torso from behind his head, also serve to heighten the titillating and shocking nature of the scene. We disagree with ABC's position that these shots convey "nothing sexual or lewd."[49] Although the scene does not depict any sexual response in the child, his presence serves to heighten the shocking nature of the scene's depiction of her nudity.[50]

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[49] ABC Response at 31.

[50] While the scene does not depict any sexual response in the child, the effect of the nudity on the child is joked about later in the episode. The woman, who is on the police force, is discussing with another policewoman whether seeing her naked might have a long-term impact on the boy when the older detective who is the boy's father walks into the squad room. The woman asks him: "How was he when you dropped him off at school?" He responds: "Dropped him off at a Hooters." When she looks perplexed, he adds: "He insisted," at which point she smiles and walks away.

17. Contrary to ABC's arguments, comparison of the instant scene to Commission precedents does not undermine our finding regarding the third principal factor. The disputed material is easily distinguishable from the nudity addressed by the Commission in *Schindler's List*.[51] In *Schindler's List*, the complainant conceded that the material he alleged to be actionably indecent was not presented to pander or titillate.[52] Indeed, the "full frontal nudity" that aired outside of safe harbor and was the subject of the complaint was, as the ABC Affiliates explain, a scene depicting concentration group prisoners "made to run around the camp fully nude as the sick are sorted from the healthy."[53] While the scene is certainly disturbing, it is neither pandering nor titillating and bears no contextual resemblance to the material in *NYPD Blue*.[54] Accordingly, we disagree with the

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[51] *See WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 1838, 1840 (nudity in broadcast of *Schindler's List* not patently offensive when considered in context of World War II concentration camp).

[52] *See id.* at 1840 ¶ 6.

[53] ABC Affiliates Response at 57.

[54] Neither do we credit ABC's argument that the nudity here is presented in a similar manner to the expletives in *Saving Private Ryan*. *See* ABC Response at 27, (citing 20 FCC Rcd 4507) (In *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, Memorandum Opinion and Order, 20

claim of the ABC Affiliates that it is "difficult to distinguish" the nudity here from the nudity in the *Schindler's List* scene.[55] Likewise, the *Will and Grace* episode

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FCC Rcd 4507 (2005), the Commission found that use of coarse, vulgar expletives in broadcast of *Saving Private Ryan* not patently offensive when considered in wartime context). The conclusion that the material here (a woman disrobing to reveal her naked buttocks) is presented in a pandering and titillating manner whereas the material in *Saving Private Ryan* (expletives uttered by soldiers in the midst of World War II) was not presented in a pandering and titillating manner is entirely unremarkable.

[55] *See* ABC Affiliates Response at 58. For the same reason, we reject the ABC Affiliates' assertion that the Commission has created a *per se* prohibition of nudity. We need not address Respondents' reliance on unpublished staff letters denying indecency complaints against broadcasts of the film *Catch-22* and other programs that contained nudity. *See* ABC Response at 18-19, 25-27; ABC Affiliates Response at 58-60. *See* 47 C.F.R. § 0.445(e) (unpublished opinions and orders of the Commission or its staff "may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission"); *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 ¶ 13 & n.47 (2003); *see also Indep. Ins. Agents of America, Inc. v. Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993) ("In the real world of agency practice, informal unpublished letters should not engender reliance.") (internal quotes and citations omitted).

cited by ABC is easily distinguishable because it presents no nudity.[56]

18. We also disagree with ABC's contention that we are refusing to defer to its artistic judgment, in contrast to cases such as *Schindler's List* and *Saving Private Ryan*.[57] We are not "second-guessing" an artistic decision by concluding that the nudity contained in *NYPD Blue* was graphic and presented in a pandering and titillating manner.[58] Art may very well be graphic, and we recognize that *NYPD Blue* was a longstanding television drama that garnered writing, directing, and acting awards, and that the scene in question related to a broad storyline of the show.[59] Our finding does not represent a conclusion that the disputed material lacked artistic or social merit. As the D.C. Circuit has recognized, however, "merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material per se not indecent."[60] Fur-

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[56] *See Omnibus Order*, 21 FCC Rcd at 2702 ¶ 158 ("the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace.").

[57] *See* ABC Response at 27; ABC Affiliates Response at 51-52.

[58] *See* ABC Affiliates Response at 52.

[59] *See* ABC Response at 26-27.

[60] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) ("ACT I")

ther, we agree with ABC that the parental advisory and rating at the beginning of the program is relevant and weighs against a finding of indecency.[61] As discussed above, however, we must weigh these factors along with the three principal factors above to ultimately determine whether the disputed material is patently offensive and therefore indecent. In context and on balance, we conclude that the graphic, repeated, pandering, titillating, and shocking nature of the scene's visual depiction of a woman's naked buttocks warrant a finding that it is patently offensive under contemporary community standards for the broadcast medium, notwithstanding any artistic or social merit and the presence of a parental advisory and rating. Therefore, it is actionably indecent.

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[61] As ABC points out, the Commission made clear in dismissing indecency complaints against broadcasts of *Schindler's List* and *Saving Private Ryan* that a prominent broadcast parental advisory, while not necessarily precluding an indecency finding, should be considered in assessing the degree to which the broadcaster is acting in a responsible manner and the degree to which the public may be surprised and offended by unexpected material. *See* ABC Response at 34-35 (citing 20 FCC Rcd at 4513 ¶¶ 15-16, 15 FCC Rcd at 1840 ¶ 6, 1842 ¶ 13); ABC Affiliates Response at 61-62.

B. Procedural Arguments

19. ABC and the ABC Affiliates raise several procedural objections to the *NAL*, including attacks on the sufficiency of the complaints underlying the Commission's action and arguments that the parties have been denied their due process rights by the Commission because of an alleged delay in providing the complaints to them and the alleged truncated period afforded them to respond to the *NAL*. We address these arguments in turn.

1. Sufficiency of Complaints

20. ABC and the ABC Affiliates contend that the complaints underlying the *NAL* did not meet the requirements of the Commission's indecency enforcement policy and should have been summarily dismissed.[62]

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[62] *See* ABC Response at 10-14 (citing *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299 (2006) ("*Omnibus Remand Order*")); ABC Affiliates Response at 21-34 (citing *Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32, 2676 ¶ 42, 2687 ¶ 86; *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299, 13328-329 ¶¶ 74-77 (2006) ("*Omnibus Remand Order*")). In addition, Channel 12 of Beaumont, Inc. (Beaumont), which joined in the ABC Affiliates Response, filed a supplement directed to matters pertinent to Station KBMT(TV). *See* Beaumont Response.

Specifically, both ABC and the ABC Affiliates argue that the Commission failed to make an initial determination as to the sufficiency of each complaint in this case, as required by the *Omnibus Remand Order*. According to ABC and the ABC Affiliates, with one exception, the subject complaints in this case were identical "form" complaints generated by a single advocacy group. Furthermore, they claim there is no evidence that any of the complainants actually viewed the subject episode of *NYPD Blue* on the stations cited in the *NAL* or on any station.[63] For these reasons, ABC and the ABC affiliates argue that the complaints are not *bona fide*, actionable complaints and should have been dismissed for lack of sufficiency. Accordingly, they contend that the Commission should rescind the *NAL*.[64]

21. The arguments advanced by ABC and ABC Affiliates regarding the sufficiency of the complaints are without merit because they are based upon a flawed understanding of our indecency enforcement policy.[65] As the Commission clarified in the *Omnibus Remand Or-*

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[63] *See* ABC Response at 10-14; ABC Affiliates Response at 23-29; Beaumont Response at 4.

[64] *See* ABC Response at 10-14; ABC Affiliates Response at 21-34; Beaumont Response at 6.

[65] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30.

der, it is sufficient that viewers in markets served by each of the ABC Stations filed complaints identifying the allegedly indecent episode of *NYPD Blue* at issue.[66] Moreover, and contrary to the arguments of ABC and the ABC Affiliates, there is no requirement that a complaint include a statement that the complainant viewed the material alleged to be indecent. The Commission has considered and rejected similar arguments.[67]

22. Each of the initial e-mail complaints received by the Commission specifically identified the February 25, 2003 episode of *NYPD Blue*, each stated that the material was aired on stations affiliated with the ABC Network, and each provided a significant excerpt of the allegedly indecent material.[68] Although the complainants

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[66] *See Omnibus Remand Order*, 21 FCC Rcd at 13323 ¶ 57, n.180, 13328-329 ¶75.

[67] *See Omnibus Remand Order*, 21 FCC Rcd at 13323 ¶ 57, n.180

[68] We reject the ABC Affiliates' argument that the complaints singularly concern the exposure of a child actor to adult female nudity on the set of *NYPD Blue* during production of the episode and cannot be read to raise a broadcast indecency issue. *See* ABC Affiliates Response at 24. There is no reasonable basis for this extremely narrow construction of the complaints. Indeed, many of the complaints specifically stated, "it is shameless that this kind of broadcast is going unchallenged by the FCC." We note, in this regard, that the Commission does not require that indecency complaints be "letter perfect," or provide an exact description of the allegedly indecent material. *See, e.g., Indecency Policy Statement*, 16 FCC Rcd at 8015 ¶ 24 & n.20 citing *Citicasters Co.*,

initially did not provide call letters of a specific ABC affiliate or other information identifying the market in which the complainant resided, Commission staff requested further information on these points in follow-up e-mails to the complainants. Specifically, the staff requested information about the television station over which the complainant saw the subject program,[69] including, if available, the station's call letters or "the city and town in which the station you watched is located."[70] The staff received numerous responses to the follow-up e-mails identifying the ABC Stations referenced in the *NAL*.[71] The follow-up emails permitted the staff to ensure that there was a complainant in the market of each of the ABC Stations against which a forfeiture is im-

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Licensee of Station KSJO(FM), San Jose, California, Notice of Apparent Liability, 15 FCC Rcd 19095 (Enf. Bur. 2000) (forfeiture paid). Once the Commission receives a valid complaint, it reviews the program material to determine whether it is indecent.

[69] *See* e-mail from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission dated December 29, 2005.

[70] *Id.*

[71] Contrary to the ABC Affiliates' suggestion, there is no requirement that the complainant include a physical address matching the affiliate's television market. *See* ABC Affiliates Response at 23.

posed herein, consistent with the Commission's enforcement policy.[72]

23. Consequently, this complaint proceeding does not present the same issues as did the complaints against KMBC-TV discussed in the *Omnibus Order Remand* and which both ABC and the ABC Affiliates cite in their responses.[73] In that case, there were no complaints filed by anyone residing in the market served by KMBC-TV. Instead, the complaints were filed by a complainant residing outside the KMBC-TV market and there was nothing in the record to tie the complaints to KMBC-TV's local viewing area.[74] With respect to stations at issue in this Order, we have affirmative state-

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[72] *See Indecency Policy Statement*, 16 FCC Rcd at 8015, ¶ 24 (requirements generally for consideration of an indecency complaint). There is no merit in the contention that it was improper for the staff to seek additional clarifying information from the complainants. The staff exercises its reasonable discretion in determining whether a particular complaint warrants further inquiry or should be dismissed as insufficient. The decision here to seek further identifying information was well within that discretion. In any event, even if the initial complaints had been dismissed, our ordinary practice would have afforded the complainants the option to refile their complaints with additional information.

[73] *See* ABC Response at 10-11; ABC Affiliates Response at 28-29; Beaumont Response at 4.

[74] *See Omnibus Remand Order*, 21 FCC Rcd at 13328-329 ¶ 75.

ments from the complainants tying the complaints to a particular ABC station or affiliated station.[75]

24. Moreover, we find no merit in the argument by ABC and the ABC Affiliates that complaints which were not filed contemporaneously with the airing of the February 25, 2003, episode of *NYPD Blue* should be dismissed.[76] The Commission does not require complainants to file indecency complaints within a specified time frame.[77] Under these circumstances, we find that the *NAL* was consistent with our commitment to an appropriately restrained enforcement policy and recent Commission practice to limit the imposition of forfeiture penalties to licensees whose stations serve markets from which specific complaints are received.[78]

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[75] We do note, however, that we must exclude as insufficient under the enforcement policy set forth in the *Omnibus Order* the complaints against 5 stations from the NAL—specifically, WBRZ-TV, Baton Rouge, LA; WXOW-TV, LaCrosse, WI; KMBC-TV, Kansas City, MO, KHOG-TV, Fayetteville, AR, and WDAY-TV, Fargo, ND.

[76] *See* ABC Response at 12-13; ABC Affiliates Response at 23-24; Beaumont Response at 4-6.

[77] *See Indecency Policy Statement*, 16 FCC Rcd at 8015, ¶ 24.

[78] The ABC Affiliates argue that the Commission's production of the complaints, pursuant to numerous FOIA and informal requests, compounded the alleged injury to their due process rights and more specifically, that the Commission never provided copies of complaints respecting eight of the stations cited in the *NAL*. See ABC Affiliates

Response at 14-17, 22-23. Two of these stations, KTKA-TV and KFBB-TV, are no longer subject to forfeitures for reasons discussed elsewhere in this Order, and thus the argument as to them is moot. As to the remaining six stations, the Commission responded on an expedited basis to all requests for complaints concerning stations named in the *NAL* where the requesting party represented the station(s) whose complaints it sought. Our records reflect that the only party requesting the complaints for these six stations did not indicate that it represented these stations and the complaints were not, therefore, provided on an expedited basis. The complaints have now been provided, but any prejudice alleged to have resulted from the timing of their production must be attributed to the stations' failure to timely request them.

In addition, the ABC Affiliates point out that certain discrepancies among the responses to their FOIA requests for the underlying complaints—mainly, the format of the information provided—raised questions as to whether they had received copies of the genuine complaints. *See* ABC Affiliates Response at 22-23. We have since corrected any such deficiencies, to the extent they existed. We note, in this regard, that the parties have not established that they suffered any actual harm as a result of these discrepancies and that they were able to and did rely on the complaints in responding to the *NAL*. Moreover, in responding to the parties' requests for the underlying complaints, we explained that the copies we first produced were Access database versions of the complaints rather than the original Outlook e-mail versions. *See* E-mail from Ben Bartolome to Mark Prak, Wade Hargrove, and David Kushner, sent Monday, February 4, 2008, at 8:02 p.m. (attaching copies of complaints in Access Version) (copy of E-mail available in FCC record). The next day, we located and produced the original Outlook versions. *See* E-mail from Ben Bartolome to Mark Prak, Wade Hargrove, and David Kushner, sent Tuesday, February 5, 2008, at 4:54 p.m. (attaching copies of same complaints, but in Outlook version) (copy of E-mail avail-

2. Notice and Length of Time to Respond to *NAL*

25. The ABC Affiliates contend that the length of time between when the episode aired and the *NAL* was issued, combined with the "unusually shortened" period of time they had for responding to the *NAL*, effectively deprived them of their administrative due process rights.[79] Beaumont, in a separate response, makes similar arguments.[80] More specifically, the ABC Affiliates claim that they did not know until the *NAL* was issued that there were pending complaints against the ABC affiliate stations concerning its broadcast of the subject *NYPD Blue* episode.[81] The ABC Affiliates note that although the Commission issued a letter of inquiry to ABC, Inc., concerning the indecency complaints the Commission had received,[82] the affiliates did not directly receive similar notice from the Commission and, therefore, did not have as much time as the ABC owned-and-operated stations to conduct a contemporaneous investi-

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able in FCC record). There is no question that the complaints we provided were "genuine."

[79] *See* ABC Affiliates Response at 9-21.

[80] *See* Beaumont Response at 5-6.

[81] *See* ABC Affiliates Response at 11-13.

[82] *See* Letter from William D. Freedman, Deputy Chief, Investigations & Hearings Division, Enforcement Bureau, FCC to Susan L. Fox, Esq., ABC Inc., dated February 3, 2004 ("Letter of Inquiry").

gation of the facts. As such, they assert that pertinent records may be non-existent or hard to locate, and knowledgeable witnesses may no longer readily be available.[83] Moreover, they argue that once the *NAL* was issued, they were afforded only 17 days, rather than the usual 30 days, in which to respond and that this shortened period further prejudiced their rights.[84]

26. We find no merit in ABC Affiliates' and Beaumont's due process arguments. Both parties fail to demonstrate that the Commission's process somehow impeded their ability to fully exercise their due process rights. The arguments advanced by the parties with respect to insufficient notice suggest a misunderstanding of the nature of the Commission's forfeiture process. Pursuant to section 1.80 of the Commission's rules, before imposing a forfeiture penalty, the Commission must provide each licensee with a written notice of apparent liability which includes an explanation of the nature of the misconduct, the rule section that the Commission believes was violated, and the proposed forfeiture amount. The *NAL* in this instance provided such required notice. There is no requirement that the Com-

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[83] *See* ABC Affiliates Response at 12.

[84] We note that potential statute of limitations concerns under 28 U.S.C. § 2462 warranted the Commission's action in providing Respondents a shorter time period than usual to respond to the *NAL*.

mission direct a letter of inquiry to a licensee as part of an investigation of alleged indecent programming aired by a broadcast station before issuing an *NAL*. Moreover, section 1.80 of the Commission's rules specifies that each licensee to which such notice is provided may file a written response demonstrating why a forfeiture penalty should not be imposed or should be reduced. By their responses to the *NAL* and various FOIA filings to obtain copies of complaints, the ABC Affiliates and other parties availed themselves of the opportunity to respond the Commission's concerns, belying their claims to the contrary.

27. Furthermore, as a practical matter we are not persuaded that the ABC Affiliates suffered any harm from the shortened *NAL* response period or the time period between the broadcast and the *NAL* under the circumstances involved here. The principal record involved here is the tape of the episode, which the ABC Affiliates do not maintain was difficult to obtain. In addition, while they argue that individual stations may have had difficulty determining whether they aired the episode within the "safe harbor," ABC provided that information to the Commission in 2004.[85] The parties' timely filings also contradict any potential claim that they have suffered actual harm and/or that the *NAL*

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[85] *See supra*, ¶2.

response time was so inadequate as to jeopardize their due process rights. The ABC Affiliates claim that "pertinent records of the broadcast *may* be non-existent or difficult to locate, and knowledgeable witnesses *may* no longer be readily available." They do not argue that such records or witnesses *were*, in fact, impossible to locate or that any particular material relevant to their case could not be found. At best, the parties argue inconvenience, which, even if true, they clearly surmounted, considering the number, coordinated nature, and overall comprehensiveness of their filings.

28. Section 1.80 provides that the "[r]espondent will be afforded a reasonable period of time (*usually* 30 days from the date of the notice) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture."[86] The Commission's rules do not state that the reasonable period of time will *always* be 30 days. A 30-day response period is not mandated. The rule only requires that the response period be reasonable, and the parties have not submitted evidence of actual harm or presented any persuasive arguments to convince the Commission that the 17 days afforded for a response in this case was not reasonable. Indeed, the evidence before us demonstrates that the ABC Affiliates were able to substantively respond to the

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[86] *See* 47 C.F.R. § 1.80(f)(3) (emphasis added).

NAL and to fully incorporate in that response relevant materials, including the underlying complaints in this proceeding. Legal counsel from 20 law firms and/or companies coordinated and responded to the *NAL* in one, consolidated, 70-page brief, with exhibits, on behalf of the majority of ABC affiliated stations. Accordingly, we conclude that the period provided for the licensees' response was reasonable and that they were neither deprived of the required notice nor an opportunity to be heard.

29. The ABC Affiliates also complain that the quality of the notice received through the *NAL* does not meet the standards set forth in Section 1.80(f)(1)(ii) because it allegedly fails to "[s]et forth the nature of the act or omission charged against the respondent and the facts upon which such charge is based."[87] We find this argument wholly unpersuasive. The *NAL* set forth the episode, air date and time, and a sufficient description of the content and how it violated the Commission's indecency rules.[88] There is no requirement, as the ABC Affiliates suggest, that the Commission provide the underlying complaint itself as part of the notice. Accordingly, we reject this argument.

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[87] *See* ABC Affiliates Response at 21; 47 C.F.R. § 1.80(f)(1)(ii).

[88] *See* NAL at ¶¶ 9-19.

30. Finally, the ABC Affiliates' argument that their due process rights have been denied because they did not have the benefit of producing evidence in the context of an administrative hearing proceeding is misplaced.[89] As the Commission has previously stated:

> It is, of course, true that the complainant's statement is "untested," in that no evidentiary hearing has been held. However, the Communications Act of 1934, as amended ("Act") permits the imposition of a forfeiture without an evidentiary hearing. The Act also protects the rights of parties subject to a forfeiture assessed without a hearing by providing that such a forfeiture cannot be used to the prejudice of the party unless it is paid or a court of competent jurisdiction has issued a final order after a trial *de novo* requiring that the forfeiture be paid.[90]

Accordingly, given the foregoing, we deny the ABC Affiliates' and Beaumont's argument that the NAL should be rescinded based on any due process or insufficient notice grounds.

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[89] *See* ABC Affiliates Response at 10.

[90] *See Infinity Broadcasting Corporation of Los Angeles*, Memorandum Opinion and Order, 16 FCC Rcd 6867, 6869 ¶ 8 nn.2-3 (Enf. Bur. 2001), *affirmed*, *Memorandum Opinion and Order*, 17 FCC Rcd 9892 (2002).

C. Other Arguments

1. Broadcast Satellite Station

31. Gray Television Licensee, Inc. ("Gray"), argues that the Commission should dismiss the case as to its satellite station, KLBY(TV), Colby, KS, and remove it from liability for the forfeiture assessed in the *NAL*.[91] Gray explains that KLBY is a satellite station of Gray's full-power station, KAKE-TV, Wichita, KS, which is already subject to the *NAL*.[92] As such, Gray asserts that KLBY(TV) "offers little more than an extension of the signal of its parent station, and makes virtually no independent programming judgments about the programming it broadcasts."[93] Further, it states that it broadcasts less than one half hour a week of programming that differs from the full power station.[94] Gray contends that the Commission's treatment of KLBY here is inconsistent with its differential treatment of satellite stations in other arenas, such as their exemption from tele-

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[91] *See* Motion to Dismiss, filed by Gray Television Licensee, Inc., Licensee of Stations KAKE-TV, Wichita, Kansas and KLBY(TV), Colby, Kansas, on February 11, 2008 ("Gray Response").

[92] *See id.* at 2.

[93] *See id.*

[94] *See id.*

vision broadcast ownership restrictions.[95] Gray claims that subjecting it to forfeitures for both KAKE-TV and KLBY airing the same content would effectively make it more expensive to own satellite stations, which contrasts with the Commission's treatment in other contexts making it less burdensome to own satellite stations.[96] In making these arguments, Gray relies on precedent concerning ownership restrictions, the burdens an applicant must satisfy to own a satellite station, and limits on independent programming a satellite station may offer.[97]

32. Notably, however, Gray does not cite indecency enforcement rules or policy to support its theory. While the Commission might have eased certain burdens on those seeking to own satellite stations, it has not made the pronouncement that Gray suggests, in effect, that the Commission should not apply the same indecency

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[95] *See id.* at 1-2 (citing *Television Satellite Stations Review of Policy & Rules*, Second Further Notice of Proposed Rulemaking, 6 FCC Rcd 5010 ¶ 3 (1991); *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12943 ¶ 90 (1999); *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13710 ¶ 233 (2003); *Television Satellite Stations: Review of Policy & Rules*, Report and Order, 6 FCC Rcd 4212, 4215-16 ¶¶ 23-25 (1991)).

[96] *See id.* at 2.

[97] *See supra*, note 94.

rules to satellite stations as it does to full-service stations. Nor has the Commission concurred in Gray's implicit contention that when a satellite station's parent station is subject to forfeiture for the airing indecent programming, the satellite station should not be fined for carrying the same material.[98]

33. The Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations. As such, Gray is correct that KLBY offers "a

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[98] We note, in fact, that the Commission has previously imposed a forfeiture on a satellite station for violation of the indecency rules and has done so while concurrently imposing a forfeiture on the satellite station's parent station for airing the same programming. *See, e.g., Super Bowl NAL*, 19 FCC Rcd at 19235 ¶ 13 (finding satellite stations KCCO-TV and KCCW-TV and their parent station, WCCO-TV, apparently liable for forfeiture for their broadcast of the Super Bowl XXXVIII Halftime Show), *affirmed*, Forfeiture Order, 21 FCC Rcd 2760 (2006), *affirmed*, Order on Reconsideration, 21 FCC Rcd 6653 (2006), *pet. for review pending on different grounds, CBS Corp. v. FCC*, No. 06-3575 (3d Cir. Filed July 28, 2006).

On a related topic, we note that the Commission has specifically stated that it will apply indecency rules to the low power broadcast service. *See An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 51 Rad. Reg. 2nd 476 ¶ 105 (1982) (noting that the statutory prohibitions against broadcast of obscene material apply to the low power service).

unique and irreplaceable service."[99] That does not mean, however, that KLBY is effectively exempt from the Commission's indecency regulation. In fact, the Commission abolished the limit on the amount of original local programming that a satellite station may originate.[100] This elimination cuts against Gray's argument because it *chooses* for its satellite station to carry most of the same programming aired by its full-service parent station rather than originate different programming. In any event, there is no reason why the viewers of a satellite station should not expect it to abide by the same content restrictions as a full-service station. Accordingly, Gray is no less responsible for the programming of its satellite station than for its full-service station. Therefore, we reject Gray's arguments on these points.

2. Statute of Limitations

34. Northeast Kansas Broadcast Service and KFBB Corporation correctly argue that the statute of limitations for the Commission to assess a forfeiture precludes it from assessing liability for KTKA-TV and KFBB-TV due to an intervening renewal grant for each station

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[99] *See* Gray Response at 2.

[100] *See Television Satellite Stations: Review of Policy & Rules*, Report and Order, 6 FCC Rcd 4212, 4215 ¶ 23 (1991) (eliminating 5% restriction on local programming by satellite television stations).

between the episode in question and the issuance of the *NAL*.[101] The Commission accordingly cancels the NAL insofar as it relates to these stations.

D. Constitutional Issues

35. Respondents argue that imposition of a forfeiture in this case would violate the First Amendment. ABC contends that Commission's indecency standard is unconstitutional on its face. In support, it asserts that the justifications that existed for adopting the current indecency standard are no longer valid; the current indecency standard is impermissibly vague; the availability of new blocking technologies has rendered the current indecency standard overbroad; and the indecency standard is subjective in a way that violates the First Amendment. The ABC Affiliates assert that the Supreme Court's decision in *Pacifica* bars the Commission from regulating brief material; the Commission failed to follow the context-driven approach required by the First Amendment; a prohibition on all broadcast nudity is

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[101] *See* Response of Former Licensee, filed by Northeast Kansas Broadcast Service, Inc., Former Licensee of Station KTKA-TV, Topeka, Kansas, on February 6, 2008; Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, filed by The Wooster Printing Company, Parent of the Former Licensee of Station KFBB-TV, Great Falls, Montana, filed on February 5, 2008.

overbroad; and the Commission must apply local, not national, community standards of patent offensiveness. For the reasons discussed below, we reject Respondents' arguments.

36. *Validity of Indecency Test.* ABC argues that the underpinnings of the Commission's current indecency standard date back to the Supreme Court's decision in *Federal Communications Commission v. Pacifica Foundation,*[102] and that the justifications upon which the Court relied in its decision—the uniquely pervasive presence of the broadcast medium and the unique accessibility of broadcasting to children—are no longer viable. In this regard, ABC argues that cable and satellite transmissions now reach the majority of the nation's television households and offer hundreds of channels as well as the signals of broadcast stations.[103]

37. We disagree with ABC's claim that the justifications upon which the Supreme Court relied in *Pacifica* are no longer valid and note that the D.C. Circuit has rejected this precise argument: "Despite the increasing availability of receiving television, such as cable . . . there can be no doubt that the traditional broadcast media are properly subject to more regulation than is gen-

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[102] *See* 438 U.S. 726 (1978).

[103] *See* ABC Response at 43 (citing *Fox Television Stations*, 489 F.3d at 464-66).

erally permissible under the First Amendment."[104] Notwithstanding ABC's arguments to the contrary, the broadcast media continue to have a "uniquely pervasive presence" in American life. The Supreme Court has recognized that "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population."[105] In 2003, 98.2% of households had at least one television, and 99% had at least one radio.[106] Although the majority of households with television subscribe to a cable or satellite service, millions of households con-

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[104] *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) *cert. denied*, 516 U.S. 1043 (1996) ("*ACT III*"). *See also Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004) (rejecting argument that broadcast ownership regulations should be subjected to higher level of scrutiny in light of rise of "non-broadcast media").

[105] *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (*quoting U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)). *See id.* at 194 (though broadcast television is "but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.").

[106] *See* U.S. Census Bureau, *Statistical Abstract of the United States* 737 (2006).

tinue to rely exclusively on broadcast television,[107] and the National Association of Broadcasters estimates that there are some 73 million broadcast-only television sets in American households.[108] Moreover, many of those broadcast-only televisions are in children's bedrooms.[109] Although the broadcast networks have experienced declines in the number of viewers over the last several years, the programming they offer remains by far the most popular and is available to almost all households.[110]

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[107] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2506-07 ¶ 8, 2508 ¶ 15 (2006).

[108] *See id.* at 2552 ¶ 97. It also has been estimated that almost half of direct broadcast satellite subscribers receive their broadcast channels over the air, *Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, 2005 WL 473322, No. 04-210, ¶ 9 (MB Feb. 28, 2005), and many subscribers to cable and satellite still rely on broadcast for some of the televisions in their households. *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15.

[109] *See* Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005). According to the Kaiser Family Foundation report, 68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections.

[110] A large disparity in viewership still exists between broadcast and cable television programs. For example, during the week of February 4, 2008, each of the top ten programs on broadcast television had more than 12.5 million viewers, while only two programs on cable television that week—both professional wrestling programs—managed to attract

Indeed, elsewhere in its response, ABC trumpets the fact that "*NYPD Blue* . . . enjoyed great popular success on the ABC Television Network, averaging more than 15 million viewers during its 12 years on the network."[111]

38. The broadcast media are also "uniquely accessible to children." In this respect, broadcast television differs from cable and satellite television. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to "fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it."[112]

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more than 5 million viewers. *See* Nielsen Media Research, "Trend Index," available at http://www.nielsen.com/media/toptens_television.html (visited Feb. 14, 2008). Indeed, that same week, 90 of the top 100-rated programs appeared on broadcast channels, and the highest rated cable program was number 71. *See* Television Bureau of Advertising, "Top 100 Programs on Broadcast and Subscription TV: Households," *available at* http://www.tvb.org/nav/build_frameset.aspx (visited Feb. 14, 2008).

[111] ABC Response at 4.

[112] 47 U.S.C. § 560 (2000). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters."[113] The V-chip provides parents with some ability to control their children's access to broadcast programming, but it does not eliminate the need for the Commission to vigorously enforce its indecency rules. In particular, as explained in further detail below, we note that numerous televisions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.[114] Accordingly, there is no merit to ABC's claim that *Pacifica*—and more importantly, our indecency rules—are invalid, obsolete or outdated.

39. *Vagueness and Overbreadth.* ABC argues that the Commission's indecency standard is unconstitutionally vague, citing *Reno v. ACLU*.[115] *Reno* addressed the constitutionality of provisions of the Communications Decency Act ("CDA") that sought to protect minors from harmful material on the Internet. The Court determined that the CDA's indecency standard was impermissibly vague because it failed to define key terms, thereby provoking uncertainty among speakers and pre-

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[113] *ACT III*, 58 F.3d at 660.

[114] *See infra*, ¶ 47.

[115] *See* ABC Response at 40-41 (citing 521 U.S. 844 (1997)).

venting them from discerning what speech would violate the statute.[116] ABC asserts that, because the CDA definition of indecency was determined by the Court to be fatally imprecise, and the Commission's definition of indecency is similar to the CDA definition, it follows that the Commission's definition is similarly flawed.[117]

40. We reject ABC's arguments that the Commission's indecency standard is vague. That standard is essentially the same as the one used in the order that was reviewed in *Pacifica*,[118] and the Supreme Court had no difficulty applying that definition and using it to conclude that the broadcast at issue in that case was indecent. We therefore agree with the D.C. Circuit that "implicit in *Pacifica*" is an acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge."[119]

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[116] *Id.* at 871.

[117] ABC Response at 40.

[118] *See* 438 U.S. at 732.

[119] *See ACT I*, 852 F.2d at 1339; *accord ACT III*, 58 F.3d at 659. ABC also contends that "imposition of forfeitures in this case would be . . . inconsistent with the Commission's past treatment of similar broadcasts and similar material," thus rendering the Commission's indecency enforcement unconstitutionally vague. ABC Response at 39-40. As we explain above, *see supra* ¶¶ 13 - 18, there is no inconsistency, so this argument necessarily fails.

41. We also believe that ABC's reliance on *Reno* is without merit. The Court in *Reno* expressly distinguished *Pacifica*, giving three different reasons for doing so.[120] Thus, far from casting doubt on *Pacifica's* vagueness holding, *Reno* recognizes its continuing vitality.

42. We also reject ABC's claim that the "contemporary community standards for the broadcast medium" criterion is impermissibly subjective.[121] The "contemporary community standards for the broadcast medium" criterion—which was upheld by the Supreme Court in *Pacifica*—is that of an average broadcast listener or viewer.[122] Our approach to discerning community standards parallels that used in obscenity cases, where the

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[120] *See Reno v. ACLU*, 521 U.S. 844, 867 (1997). First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when—rather than whether—it would be permissible" to air indecent material." *Id.* The CDA, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times." *Id.* Second, the CDA was a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts. *See id.* at 867, 872. Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection." *Id.* at 867.

[121] *See* ABC Response at 41-42.

[122] *See Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 8 and n.15.

jury is instructed to rely on its own knowledge of community standards in determining whether material is patently offensive.[123] Here, however, the Commission has the added advantage of being an expert agency, and as we have explained before, "[w]e rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."[124] In applying this standard, the Commission does not apply its own "personal sensibilities,"[125] but at the same time it is settled that "merit is properly treated as a factor in determining whether material is patently offensive."[126]

43. The ABC Affiliates contend that the Commission's application of community standards "is unconstitutionally overbroad because it constitutes a national standard to determine whether broadcast material is patently offensive, rather than local community stan-

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[123] *See Smith v. United States*, 431 U.S. 291, 305 (1977).

[124] *See Infinity Radio License, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 5022, 5026 ¶ 12, *recon. denied*, 19 FCC Rcd 16959 (2004).

[125] *See* ABC Response at 42.

[126] *See ACT I*, 852 F.2d at 1340.

dards."[127] Instead, the ABC Affiliates contend that the Commission must "examine[ ] the mores of the more than four dozen various geographic communities in which the *NYPD Blue* episode was viewed and for which the ABC Affiliates are being cited."[128]

44. This argument is unavailing. Our longstanding indecency test focuses on whether material is patently offensive as measured by contemporary community standards for the "broadcast medium" generally, rather than those of any particular community. That is the standard the Supreme Court affirmed in *Pacifica*, without any suggestion that the Commission erred by not determining whether broadcast of the Carlin monologue was patently offensive according to the community standards of New York, the only community in which there was a complaint about its broadcast.[129] If application of a national standard was appropriate in *Pacifica*, it clearly was in this case, which involves a national broadcast and complaints arising from many parts of the country.

45. For their contrary position, the ABC Affiliates rely principally on criminal obscenity prosecutions, which present distinct concerns not applicable to this non-criminal proceeding involving indecency, not ob-

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[127] *See* ABC Affiliates' Response at 69.

[128] *See* ABC Affiliates' Response at 69.

[129] *See Pacifica*, 438 U.S. at 729, 732.

scenity.[130] Even in the context of obscenity, however, the Supreme Court has said only that the First Amendment does not *require* juries to apply nationwide community standards. States therefore have the option of defining obscenity based on more localized community standards, but nothing in the Supreme Court's obscenity case law requires them to do so.[131] Indeed, a national standard actually facilitates national broadcasting, since it provides more certainty and avoids the necessity of tailoring national programming station-by-station based on the potentially disparate community standards of a nationwide television audience.[132]

46. ABC also asserts that television viewers today are able to effectively prevent reception of any program-

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[130] *See Pacifica*, 438 U.S. at 739 n.13 ("the validity of the civil sanctions [for violation of 18 U.S.C. § 1464] is not linked to the validity of the criminal penalty.").

[131] *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) ("*Miller* approved the use of such instructions [requiring application of state-specific community standards]; it did not mandate their use."); *see also Ashcroft v. ACLU*, 535 U.S. 564, 587-89 (2002) (O'Connor, J., concurring in part and concurring in the judgment) (a national community standard for evaluating possible indecency on the Internet would be "not only constitutionally permissible, but also reasonable").

[132] *See Ashcroft*, 535 U.S. at 591 (Breyer, J., concurring in part and concurring in the judgment) (First Amendment militates in favor of national, as opposed to local, community standards in evaluating possible indecency on the Internet).

ming that they consider unsuitable for children through the use of voluntary ratings of programs by the entertainment industry and so-called "V-Chip" technology.[133] The existence of a less intrusive solution, according to ABC, thus renders the Commission's regulatory scheme unconstitutionally overbroad.[134] Likewise, the ABC Affiliates state that the "V-chip is not itself dispositive of the legal issue in this case" but nonetheless claim that its availability creates "constitutional ramifications" militating against a finding of indecency here.[135]

47. We reject these arguments. While we agree that the V-chip provides some assistance in protecting children from indecent material, it does not eliminate the need for the Commission to enforce its indecency rules. Numerous televisions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.[136] In

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[133] *See* ABC Response at 43-45.

[134] *See id.* at 44.

[135] ABC Affiliates Response at 65-66.

[136] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667 ¶ 37. According to a 2003 study, parents' low level of V-chip use is explained in part by parents' ignorance of the device and the "multi-step and often confusing process" necessary to use it. Annenberg Public Policy Center, *Parents' Use of the V-Chip to Supervise Children's Television Use* 3 (2003). Only 27 percent of mothers in the study group could figure out how to program the V-Chip, and "many mothers who

addition, we note that some categories of programming, including news and sports, are not rated and, therefore, are not subject to blocking by V-chip technology.[137] Finally, numerous studies have raised serious questions about the accuracy of the television ratings on which the effectiveness of a V-chip depends.[138] In this case, for example, the V-chip would have failed a parent attempting to shield her children from exposure to nudity by filtering out all programs with an "S" content descriptor

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might otherwise have used the V-Chip were frustrated by an inability to get it to work properly." *Id.* at 4.

[137] *See Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43, ¶ 21 (1998).

[138] *See, e.g.*, Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 Journal of Broadcasting & Electronic Media 554, 563-64 (2004) (finding that there was more coarse language broadcast during TV-PG programs than those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe); Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) (nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately); David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 Pediatrics 1302, 1306 (2001) (study finding that parents concluded that half of television shows the industry had rated as appropriate for teenagers were in fact inappropriate, "a signal that the ratings are misleading.").

(for "sexual situations") since ABC did not include such a descriptor for this program.[139]

48. The ABC Affiliates also argue that a finding of indecency in this case is unconstitutionally overbroad because it amounts to proscription of "*all* non-sexual nudity on television."[140] This argument is based on a false premise. As discussed above, our finding that the broadcast included a depiction of sexual or excretory organs—namely a woman's buttocks—was necessary, but not sufficient, to find the broadcast indecent.[141] We find the nudity here indecent because it was patently offensive when considered in light of contemporary community standards for the broadcast medium. In particular, we find that, in context, the material was shocking, pandering, and titillating.[142] This case therefore does not present the question whether a prohibition on broadcast of all "non-sexual nudity" would be constitutionally overbroad.

49. *Conflict with Pacifica.* The ABC Affiliates also argue that the "*Pacifica* decision makes it clear that the fleeting nature of the nudity depicted here . . . may

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[139] *See* ABC Response at 6.

[140] ABC Affiliates Response at 67.

[141] *See supra* ¶ 7 .

[142] *See supra* ¶ 16.

not be proscribed."[143] We reject this contention. As an initial matter, the ABC Affiliates are wrong factually: the nudity included in this broadcast was not fleeting.[144] Even if it were, however, *Pacifica* would pose no barrier to a finding of indecency. First, *Pacifica* involved spoken expletives, not images of nudity. Even if it were true that the Court in *Pacifica* had drawn the First Amendment line at the twelve minutes it took Carlin to complete his monologue, there is no reason to believe it would require the same amount of repetition in a case of nudity.[145] In any event, contrary to the ABC Affiliates' contention, *Pacifica* did not decide that regulation of brief expletives would be unconstitutional but instead expressly reserved the question.[146]

50. The ABC Affiliates also contend that a forfeiture here would conflict with *Pacifica*'s recognition that "'context is all-important'"[147] because of "the fact that the depiction of bare buttocks occurred in a gritty, real-

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[143] ABC Affiliates Response at 63.

[144] *See supra* ¶ 15.

[145] *Cf. United States v. Martin*, 746 F.2d 964, 971-72 (3d Cir. 1984) ("The hackneyed expression, 'one picture is worth a thousand words' fails to convey adequately the comparison between the impact of the televised portrayal of actual events upon the viewer of the videotape and that of the spoken or written word upon the listener or reader.")

[146] *See* 438 U.S. at 750.

[147] ABC Affiliates Response at 64 (quoting *Pacifica*, 438 U.S. at 750).

istic police drama unlikely to attract an audience of children, even at 9:00 p.m."[148] Contrary to the ABC Affiliates' contention, our finding of indecency takes full account of context and reflects careful application of three contextual factors we apply in all our indecency cases.[149] Moreover, it is settled that the Commission is permitted to regulate indecency between the hours of 6 a.m. and 10 p.m.—the time of day when children are most likely to be in the audience—and is not required to determine on a broadcast-by-broadcast basis whether children were watching.[150] The licensees could have, but did not, broadcast this episode of *NYPD Blue* after 10 p.m.—as their counterparts in the Eastern and Pacific time zones did—and not run afoul of the Commission's indecency regulations.

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[148] ABC Affiliates Response at 64-65.

[149] *See supra* ¶¶ 12 - 18.

[150] *See ACT III*, 58 F.3d at 665-66. As the D.C. Circuit explained, ratings data likely under-estimate the number of children in the audience for indecent programming because "[c]hildren will not likely record, in a Nielsen diary or other survey, that they listen to or view programs of which their parents disapprove." *Id.* at 665. In addition, the court noted that "changes in the program menu make yesterday's findings irrelevant today" and "such station-and program-specific data do not take 'children's grazing' into account." *Id.* at 665-66.

IV. CONCLUSION

51. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(a) of the Commission's rules, 47 C.F.R § 1.80, both state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules.[151] Based on our determination that the stations in question willfully broadcast this episode of *NYPD Blue* and the material before us, we find that the ABC stations willfully violated 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, by airing indecent programming during the *NYPD Blue* program on February 25, 2003.

52. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of $7,000 for the transmission of indecent or obscene materials.[152] The *Forfeiture*

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[151] *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991).

[152] *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 12 FCC Rcd 17087, 17113 (1997), *recons. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

Policy Statement also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." For the following reasons, we find that $27,500, the maximum applicable forfeiture during the time the material was broadcast, is an appropriate proposed forfeiture for the material found to be apparently indecent in this case. The scene depicts a woman's naked buttocks in a graphic and shocking manner. The material was prerecorded, and ABC or its affiliates could have edited or declined the content prior to broadcast.[153] Although ABC included a warning, we find that a lower forfeiture is not warranted here in light of all the circumstances surrounding the apparent violation, including the shocking and titillating nature of the scene. On balance and in light of all of the circumstances, we find that a $27,500 forfeiture amount for each station would appropriately punish and deter the apparent violation in this case. Therefore, we find that each

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[153] *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America"* on April 7, 2003, Notice of Apparent Liability, 19 FCC Rcd 20191, 20196 ¶ 16 (2004).

licensee listed in the Attachment is apparently liable for a proposed forfeiture of $27,500 for each station that broadcast the February 25, 2003, episode of *NYPD Blue* prior to 10 p.m.[154]

53. Although we are informed that other stations not mentioned in any complaint also broadcast the complained-of episode of *NYPD Blue*, we propose forfeitures against only those licensees whose broadcasts of the material between 6 a.m. and 10 p.m. were actually the subject of viewer complaints to the Commission. This result is consistent with the approach set forth by the Commission in its most recent indecency orders.[155] As indicated in those orders, our commitment to an appropriately restrained enforcement policy justifies this more limited approach toward the imposition of forfei-

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[154] The fact that the stations in question may not have originated the programming is irrelevant to whether there is an indecency violation. *See Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, Notice of Proposed Rulemaking, 10 FCC Rcd 11951,11961, ¶ 20 (1995) (internal quotation omitted) ("We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.").

[155] *See Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32; *Omnibus Remand Order*, 21 FCC Rcd at 13328-329 ¶¶ 74-77.

ture penalties. Accordingly, we propose forfeitures as set forth in the Attachment.

54. We have thoroughly considered all of the licensees' arguments as well as the factors listed in section 503(b)(2)(D) of the Act. On balance, we believe that a forfeiture penalty in the base amount of $27,500 against the stations listed in Attachment A is appropriate.

V. ORDERING CLAUSES

55. **ACCORDINGLY, IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,[156] that each of the ABC stations listed in Attachment A of this Forfeiture Order are liable for a forfeiture in the amount of $27,500 each for broadcasting indecent material, in willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

56. **IT IS FURTHER ORDERED** that the NAL is cancelled as to Northeast Kansas Broadcast Service, Inc., for KTKA-TV; KFBB Corporation, for KFBB-TV; Louisiana Television Broadcasting, LLC, for WBRZ-TV; WXOW-WQOW Television, Inc., for WXOW-TV; KMBC Hearst-Argyle Television, Inc., for KMBC-TV; KHBS Hearst-Argyle Television, Inc., for KHOG-TV; and Fo-

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[156] 47 C.F.R. § 1.80.

rum Communications Company, for WDAY-TV, for the reasons discussed elsewhere in this *Order*.

57. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the Commission's rules, that each of the stations listed in Attachment A of this Forfeiture Order **SHALL PAY** the full amount of its respective forfeiture by the close of business on Thursday, February 21, 2008. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account number and FRN Number referenced in the Attachment. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payments by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in box 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer - Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington,

D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Any station that pays its forfeiture by close of business on February 21 shall so notify Ben Bartolome, Acting Chief of the Enforcement Bureau's Investigations and Hearings Division, by email (Ben.Bartolome@fcc.gov) by close of business that day. The Commission will ensure that each of the stations listed in Attachment A of the Forfeiture Order is notified immediately upon release by the Commission.

58. **IT IS FURTHER ORDERED** that the Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

59. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent, by Certified Mail/Return Receipt Requested, to each of the licensees identified in Attachment A hereto and to their respective counsel and representatives identified in Attachment B hereto.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

ATTACHMENT A

Forfeitures For February 25, 2003
Broadcasts Of *NYPD Blue*

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Cedar Rapids Television Company, 2nd Avenue at 5th Street, NE, Cedar Rapids, IA 52401	0002589489	200832080013	KCRG-TV Cedar Rapids, IA	9719	$27,500
Centex Television Limited Partnership, P. O. Box 2522, Waco, TX 76702	0001675719	200832080014	KXXV(TV) Waco, TX	9781	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Channel 12 of Beaumont, Inc., 525 Interstate Highway, 10 South, Beaumont, TX 77701	0006587307	200832080015	KBMT(TV) Beaumont, TX	10150	$27,500
Citadel Communications, LLC, 4 Pondfield Road, Suite 12, Bronxville, NY 10708	0003757481	200832080016	KLKN(TV) Lincoln, NE	11264	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
KLTV/KTRE License Subsidiary, LLC, 201 Monroe Street, RSA Tower 20th Floor, Montgomery, AL 36104	0015798341	200832080017	KLTV(TV) Tyler, TX	68540	$27,500
Duhamel Broadcasting Enterprises, 518 St. Joseph Street,, Rapid City, SD 57701	0002433340	200832080018	KOTA-TV Rapid City, SD	17688	$27,500
Gray Television Licensee Corp., 150 North West Street, Wichita, KS 67203	0002746022	200832080020	KAKE-TV Wichita, KS	65522	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Gray Television Licensee, Inc., P. O. Box 10, Wichita, KS 67201	0002746022	200832080021	KLBY(TV) Colby, KS	65523	$27,500
KSTP-TV, LLC, 3415 University Avenue, West, St. Paul, MN 55114-2099	0009769621	200832080022	KSTP-TV St. Paul, MN	28010	$27,500
KATC Communications, Inc., 1103 Eraste Landry Road, Lafayette, LA 70506	0003822285	200832080023	KATC(TV) Lafayette, LA	33471	$27,500
KATV, LLC, P. O. Box 77, Little Rock, AR 72203	0001694462	200832080024	KATV(TV) Little Rock, AR	33543	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
KDNL Licensee, LLC, c/o Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128	0002144459	200832080025	KDNL-TV St. Louis, MO	56524	$27,500
KETV Hearst-Argyle Television, Inc., c/o Brooks, Pierce, et al, P. O. Box 1800, Raleigh, NC 27602	0003799855	200832080026	KETV(TV) Omaha, NE	53903	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
KSWO Television Company, Inc., P. O. Box 708, Lawton, OK 73502	0001699248	20083280030	KSWO-TV Lawton, OK	35645	$27,500
KTBS, Inc., P. O. Box 44227, Shreveport, LA 71104	0003727419	20083280031	KTBS-TV Shreveport, LA	35652	$27,500
KTRK Television, Inc., 77 W. 66th Street, Floor 16, New York, NY 10023-6201	0001280109	20083280032	KTRK-TV Houston, TX	35675	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
KTUL, LLC, 3333 S. 29th West Avenue, Tulsa, OK 74107	0001694413	2008320 80033	KTUL(TV) Tulsa, OK	35685	$27,500
KVUE Television, Inc., 400 South Record Street, Dallas, TX 75202	0001545581	2008320 80034	KVUE(TV) Austin, TX	35867	$27,500
McGraw-Hill Broadcasting Company, 1221 Speer Boulevard, Denver, CO 80203	0003476827	2008320 80036	KMGH-TV Denver, CO	40875	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Media General Communication Holdings, LLC,, 333 E. Franklin Street, Richmond, VA 23219-2213	0015751217	200832080037	WMBB (TV) Panama City, FL	66398	$27,500
Mission Broadcasting, Inc., 544 Red Rock Drive, Wadsworth, OH 44281	0004284899	200832080038	KODE-TV Joplin, MO	18283	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Mississippi Broadcasting Partners, c/o Anne Swanson, Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW, Suite 800, Washington DC 20036-6802	0003828753	200832080039	WABG-TV Greenwood, MS	43203	$27,500
Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039	0009961889	200832080040	WDHN (TV) Dothan, AL	43846	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
New York Times Management Services Co. c/o New York Times Co., 229 W.43rd Street, New York, NY 10036-3913	0003481587	200832080041	WQAD-TV Moline, IL	73319	$27,500
Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039	0009961889	200832080042	KQTV(TV) St. Joseph, MO	20427	$27,500
NPG of Texas, L.P., 4140 Rio Bravo, El Paso, TX 79902	0006548028	200832080044	KVIA-TV El Paso, TX	49832	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Ohio/Oklahoma Hearst-Argyle Television, c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0001587609	200832080045	KOCO-TV Oklahoma City, OK	12508	$27,500
Piedmont Television of Huntsville License, LLC, c/o Piedmont Television Holdings LLC, 7621 Little Avenue, Suite 506, Charlotte, NC 28226	0004063483	200832080046	WAAY-TV Huntsville, AL KSPR(TV) Springfield, MO	57292 35630	$55,000

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Pollack/Belz Communications Co., Inc., 5500 Poplar Lane, Memphis, TN 38119-3716	0006096200	200832080047	KLAX-TV Alexandria, LA	52907	$27,500
Post-Newsweek Stations, San Antonio, Inc., c/o Post-Newsweek Stations, 550 West Lafayette Boulevard, Detroit, MI 48226-3140	0002149953	200832080048	KSAT-TV San Antonio, TX	53118	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Scripps Howard Broadcasting Co., 312 Walnut Street, Cincinnati, OH 45202	0012487609	200832080049	KNXV-TV Phoenix, AZ	59440	$27,500
Southern Broadcasting, Inc., P. O. Box 1645, Tupelo, MS 38802	0005411632	200832080050	WKDH (TV) Houston, MS	83310	$27,500
Tennessee Broadcasting Partners, c/o Russell Schwartz, One Television Place, Charlotte, NC 28205	0003828696	200832080051	WBBJ-TV Jackson, TN	65204	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Tribune Television New Orleans, Inc., 1 Galleria Boulevard, Suite 850, Metairie, LA 70001	0002847564	200832080052	WGNO(TV) New Orleans, LA	72119	$27,500
WAPT Hearst-Argyle TV, Inc., (CA Corp.), P. O. Box 1800, Raleigh, NC 27602	0005008867	200832080053	WAPT(TV) Jackson, MS	49712	$27,500
WDIO-TV, LLC, 3415 University Avenue West, St. Paul, MN 55114-2099	0004199139	200832080054	WDIO-TV Duluth, MN	71338	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
WEAR Licensee, LLC, Pillsbury, Winthrop, Shaw, Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128	0004970935	200832080055	WEAR-TV Pensacola, FL	71363	$27,500
WFAA-TV, Inc., 4000 South Record Street, Dallas, TX 75202	0000161496	200832080056	WFAA-TV Dallas, TX	72054	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
WISN Hearst-Argyle TV, Inc. (CA Corp.), P. O. Box 1800, Raleigh, NC 27602	0003792603	200832080057	WISN-TV Milwaukee, WI	65680	$27,500
WKOW Television, Inc., P. O. Box 909, Quincy, IL 62306	0004383683	200832080058	WKOW-TV Madison, WI	64545	$27,500
WKRN, G.P., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0005015037	200832080059	WKRN-TV Nashville, TN	73188	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
WLS Television, Inc., 77 W. 66th Street, Floor 16, New York, NY 10023-6201	0003471315	200832080060	WLS-TV Chicago, IL	73226	$27,500
WSIL-TV, Inc., 5009 South Hulen, Suite 101, Fort Worth, TX 76132-1989	0002808137	200832080061	WSIL-TV Harrisburg, IL	73999	$27,500
Young Broadcasting of Green Bay, Inc., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0004994984	200832080063	WBAY-TV Green Bay, WI	74417	$27,500

ATTACHMENT B

Pleadings Filed Responding to NAL[157]

Responses to the Notices of Apparent Liability for Forfeiture:

- Opposition to Notice of Apparent Liability for Forfeiture of 50 Television Broadcast Stations Affiliated with the ABC Television Network and of the ABC Television Affiliates Association, filed on February 11, 2008, by Cedar Rapids Television Company, Licensee of Station KCRG-TV, Cedar Rapids, Iowa; Centex Television Limited Partnership, Licensee of Station KXXV(TV), Waco, Texas; Channel 12 of Beaumont, Inc., Licensee of Station KBMT(TV), Beaumont, Texas; Citadel Communications, LLC, Licensee of Station KLKN(TV), Lincoln, Nebraska; Duhamel Broadcasting Enterprises, Licensee of Station KOTA-TV, Rapid City, South Dakota; Forum Communications Company, Licensee of Station WDAY-TV, Fargo, North Dakota; Gray Television Licensee, Inc., Licensee of Stations KAKE-TV, Wichita, Kansas and KLBY(TV), Colby, Kansas; KATC Communications, Inc., Licensee of Station KATC(TV), Lafayette, Louisiana; KATV

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[157] This list excludes any Freedom of Information Act requests.

LLC, Licensee of Station KATV(TV), Little Rick Arkansas; KDNL Licensee, LLC, Licensee of Station KDNL-TV, St. Louis, Missouri; Hearst-Argyle Television, Inc., Parent of the Licensee of Stations KETV(TV), Omaha, Nebraska, KHOG-TV, Fayetteville, Arkansas, KMBC-TV, Kansas City, Missouri, KOCO-TV, Oklahoma City, Oklahoma, WAPT(TV), Jackson, Mississippi, and WISN-TV, Milwaukee, Wisconsin; KLTV/KTRE License Subsidiary, LLC, Licensee of Station KLTV(TV), Tyler, Texas; KSTP-TV, LLC, Licensee of Station KSTP-TV, St. Paul, Minnesota; KSWO Television Co., Inc., Licensee of Station KSWO-TV, Lawton, Oklahoma; KTBS, Inc., Licensee of Station KTBS-TV, Shreveport, Louisiana; KTUL, LLC, Licensee of Station KTUL(TV),Tulsa, Oklahoma; KVUE Television, Inc., Licensee of Station KVUE(TV), Austin, Texas; Louisiana Television Broadcasting, LLC, Licensee of Station WBRZ-TV, Baton Rouge, Louisiana; McGraw-Hill Broadcasting Company, Licensee of Station KMGH-TV, Denver, Colorado; Media General Communication Holdings, LLC, Licensee of Station WMBB(TV), Panama City, Florida; Mission Broadcasting, Inc., Licensee of Station KODE-TV, Joplin, Missouri; Mississippi Broadcasting Partners, Licensee of Station WABG-TV, Greenwood, Mississippi; Lo-

cal TV Illinois License, LLC, Licensee of Station WQAD-TV, Moline, Illinois; Nexstar Broadcasting, Inc., Licensee of Stations WDHN(TV), Dothan, Alabama, and KQTV(TV), St. Joseph, Missouri; Northeast Kansas Broadcast Service, Inc., Former Licensee of Station KTKA-TV, Topeka, Kansas; NPG of Texas, L.P., Licensee of Station KVIA-TV, El Paso, Texas; Piedmont Television of Huntsville License, LLC, Licensee of Stations WAAY-TV, Huntsville, Alabama and KSPR(TV), Springfield, Missouri; Pollack/Belz Communications Co., Inc., Licensee of Station KLAX-TV, Alexandria, Louisiana; Post-Newsweek Stations, San Antonio, Inc., Licensee of Station KSAT-TV, San Antonio, Texas; Scripps Howard Broadcasting Company, Licensee of Station KNXV-TV, Phoenix, Arizona; Southern Broadcasting, Inc., Licensee of Station WKDH(TV), Houston, Texas; Tennessee Broadcasting Partners, Licensee of Station WBBJ-TV, Jackson, Tennessee; Tribune Company, Parent of the Licensee of Station WGNO(TV), New Orleans, Louisiana; WDIO-TV, LLC, Licensee of Station WDIO-TV, Duluth, Minnesota; WEAR Licensee, LLC, Licensee of Station WEAR-TV, Pensacola, Florida; WFAA-TV, Inc., Licensee of Station WFAA-TV, Dallas, Texas; WKOW Television, Inc., Licensee of Station WKOW-TV, Madison, Wisconsin; WKRN,

G.P., Licensee of Station WKRN-TV, Nashville, Tennessee; WSIL-TV, Inc., Licensee of Station WSIL-TV, Harrisburg, Illinois; WXOK-WQOW Television, Inc., Licensee of Station WXOW-TV, LaCrosse, Wisconsin; Young Broadcasting of Green Bay, Inc., Licensee of Station WBAY-TV, Green Bay, Wisconsin;

- Opposition of Channel 12 of Beaumont, Inc. to Notice of Apparent Liability for Forfeiture filed by Channel 12 of Beaumont, Inc. ("Beaumont"), Licensee of Station KBMT(TV), Beaumont, Texas, on February 11, 2008 ("Beaumont Response");
- Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, filed by The Wooster Printing Company ("WPRC"), Parent of the former Licensee of Station KFBB-TV, Great Falls, Montana, filed on February 5, 2008 ("WPRC Response");
- Statement of Support filed by Max Media of Montana II LLC ("Max Media"), current Licensee of Station KFBB-TV, Great Falls, Montana, filed on February 11, 2008 ("KFBB Response");
- Opposition of ABC, Inc. to Notice of Apparent Liability for Forfeiture filed on February 11, 2008 by ABC, Inc. ("ABC"), Parent of the WLS

Television, Inc., Licensee of Station WLS-TV, Chicago, Illinois, and KTRK Television, Inc., Licensee of Station KTRK-TV, Houston, Texas ("ABC Response");

- Response of Former Licensee, filed by Northeast Kansas Broadcast Service, Inc. ("Northeast"), Former Licensee of Station KTKA-TV, Topeka, Kansas, on February 6, 2008 ("Northeast Response");

Requests for Extension of Time:

- Petition for Extension of Time filed by Channel 12 of Beaumont, Inc., Licensee of Station KBMT(TV), Beaumont, Texas, on February 4, 2008;

- Letter to Matthew Berry, General Counsel, Federal Communications Commission, cc: Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time on February 1, 2008 from Forum Communications Company, Licensee of Station WDAY-TV, Fargo, North Dakota; KVUE Television, Inc., Licensee of Station KVUE(TV), Austin, Texas; and WFAA-TV, Inc., Licensee of Station WFAA-TV, Dallas, Texas;

- Motion for Extension of Time filed by Pollack/Belz Communications Co., Inc., Licensee of Station KLAX-TV, Alexandria, Louisiana, on February 1, 2008;
- Motion for Extension of Time filed by Post-Newsweek Stations, San Antonio, Inc., Licensee of Station KSAT-TV, San Antonio, Texas, on February 1, 2008;
- Motion for Extension of Time KLTV/KTRE License Subsidiary, LLC, Licensee of Station KLTV(TV), Tyler, Texas, on February 1, 2008;
- Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time on February 1, 2008 from Centex Television Limited Partnership, Licensee of Station KXXV(TV), Waco, Texas; and KSWO Television Co., Inc., Licensee of Station KSWO-TV, Lawton, Oklahoma;
- Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time, from Scripps Hoard Broadcasting Company, Licensee of Station KNXV-TV, Phoenix, Arizona, on February 1, 2008;

- Motion by ABC Television Affiliates Association and Named Licensees for Extension of Time to Response to Notice of Apparent Liability for Forfeiture and Letter to Matthew Berry, General Counsel, Federal Communications Commission, cc: Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time on February 1, 2008 from Cedar Rapids Television Company, Licensee of Station KCRG-TV, Cedar Rapids, Iowa; Citadel Communications, LLC, Licensee of Station KLKN(TV), Lincoln, Nebraska; Request for Extension of Time filed by Duhamel Broadcasting Enterprises, Licensee of Station KOTA-TV, Rapid City, South Dakota; KATV LLC, Licensee of Station KATV(TV), Little Rick Arkansas; Hearst-Argyle Television, Inc., Parent of the Licensee of Stations KETV(TV), Omaha, Nebraska; KHOG-TV, Fayetteville, Arkansas; KMBC-TV, Kansas City, Missouri; KOCO-TV, Oklahoma City, Oklahoma; WAPT(TV), Jackson, Mississippi; WISN-TV, Milwaukee, Wisconsin; KTBS, Inc., Licensee of Station KTBS-TV, Shreveport, Louisiana; KTUL, LLC, Licensee of Station KTUL(TV),Tulsa, Oklahoma; NPG of Texas, L.P., Licensee of Station KVIA-TV, El Paso, Texas; WKOW Television, Inc., Licensee of Station WKOW-TV, Madison, Wisconsin; WKRN,

G.P., Licensee of Station WKRN-TV, Nashville, Tennessee; WSIL-TV, Inc., Licensee of Station WSIL-TV, Harrisburg, Illinois; WXOK-WQOW Television, Inc., Licensee of Station WXOW-TV, LaCrosse, Wisconsin; Young Broadcasting of Green Bay, Inc., Licensee of Station WBAY-TV, Green Bay, Wisconsin; Tennessee Broadcasting Partners, Licensee of Station WBBJ-TV, Jackson, Tennessee; Mississippi Broadcasting Partners, Licensee of Station WABG-TV, Greenwood, Mississippi; Request for Extension of Time filed by Louisiana Television Broadcasting, LLC, Licensee of Station WBRZ-TV, Baton Rouge, Louisiana;

- Motion for Extension of Time of KSPT-TV and WDIO-TV filed on February 4, 2008 by KSTP-TV, LLC, Licensee of Station KSTP-TV, St. Paul, Minnesota; WDIO-TV, LLC, Licensee of Station WDIO-TV, Duluth, Minnesota.

STATEMENT OF

COMMISSIONER ROBERT M. McDOWELL

RE: ***Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"***, Forfeiture Order, File Nos. EB-03-IH-0122 and EB-03-IH-0353

While I agree with the substance of the Commission's decision today, I write separately to note my concerns about a procedural aspect to this proceeding. After the Commission issued its notice of apparent liability for forfeiture, the stations were given only 17 days to file a response—far shorter than the 30 days that is our usual practice. In this instance, the 52 stations, represented by the network and affiliates association, had the resources and wherewithal to prepare a comprehensive and timely response. That may not always be the case. I hope that in future proceedings, we will grant parties a more reasonable opportunity to respond to Commission charges.

APPENDIX F

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File Nos. EB-03-IH-0122 and EB-03-IH-0353[1]

IN THE MATTER OF COMPLAINTS AGAINST VARIOUS TELEVISION LICENSEES CONCERNING THEIR FEBRUARY 25, 2003 BROADCAST OF THE PROGRAM "NYPD BLUE"

Adopted: Jan. 25, 2008
Released: Jan. 25, 2008

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

By the Commission: Commissioner Tate issuing a separate statement.

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[1] The NAL/Acct. No. and FRN number for each licensee subject to this Notice are enumerated in the Attachment.

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture ("NAL")*, issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's rules,[2] we find that the ABC Television Network ("ABC") affiliated stations and ABC owned-and-operated stations listed in the Attachment to this *NAL* aired material that apparently violates the federal restrictions regarding the broadcast of indecent material.[3] Specifically, during the February 25, 2003 episode of the ABC program "NYPD Blue," aired at 9:00 p.m. Central Standard Time and Mountain Standard Time, these licensees each broadcast adult female nudity. Based upon our review of the facts and circumstances of this case, we conclude that each licensee listed in the Attachment is apparently liable for a monetary forfeiture in the amount of $27,500 per station for broadcasting indecent material in apparent violation of 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules.

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[2] *See* 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

[3] *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

II. BACKGROUND

2. Section 1464 of Title 18, United States Code, prohibits the broadcast of obscene, indecent, or profane programming.[4] The FCC rules implementing that statute, a subsequent statute establishing a "safe harbor" during certain hours, and the Act prohibit radio and television stations from broadcasting obscene material at any time and indecent material between 6 a.m. and 10 p.m.[5]

3. ***Indecency Analysis.*** Enforcement of the provisions restricting the broadcast of indecent, obscene, or profane material is an important component of the Commission's overall responsibility over broadcast radio and television operations. At the same time, however, the Commission must be mindful of the First Amendment to the United States Constitution and Section 326 of the Act, which prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights.[6] As such, in making indecency determina-

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[4] *See* 18 U.S.C. § 1464.

[5] *See* 47 C.F.R. § 73.3999.

[6] *See* U.S. CONST., amend. I; 47 U.S.C. § 326. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

tions, the Commission proceeds cautiously and with appropriate restraint.[7]

4. The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.[8]

> Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently*

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[7] *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1344, 1340 n.14 (1988) ("*ACT I*") (stating that "[b]roadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear," and that any "potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

[8] *See Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*")).

offensive as measured by contemporary community standards for the broadcast medium.[9]

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[9] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 ¶¶ 7-8 (2001) ("*Indecency Policy Statement*") (emphasis in original). In applying the "community standards for the broadcast medium" criterion, the Commission has stated:

> The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.

WPBN/WTOM License Subsidiary, Inc., Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841 ¶ 10 (2000) ("*WPBN/WTOM MO&O*"). The Commission's interpretation of the term "contemporary community standards" flows from its analysis of the definition of that term set forth in the Supreme Court's decision in *Hamling v. United States*, 418 U.S. 87 (1974), *reh'g denied*, 419 U.S. 885 (1974). In *Infinity Broadcasting Corporation of Pennsylvania (WYSP(FM))*, Memorandum Opinion and Order, 3 FCC Rcd 930 (1987) (subsequent history omitted), the Commission observed that in *Hamling*, which involved obscenity, "the Court explained that the purpose of 'contemporary community standards' was to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Id.* at 933 (citing 418 U.S. at 107). The Commission also relied on the fact that the Court in *Hamling* indicated that decisionmakers need not use any precise geographic area in evaluating material. *Id.* at 933 (citing 418 U.S. at 104-05). Consistent with *Hamling*, the Commission concluded that its evaluation of alleged-

5. In our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."[10] Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the material; (2) whether the material dwells on or repeats at length depictions or descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.[11] In examining these three factors, we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly, other factors."[12] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[13]

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ly indecent material is "not one based on a local standard, but one based on a broader standard for broadcasting generally." *Id.* at 933.

[10] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

[11] *See id.* at 8002-15 ¶¶ 8-23.

[12] *Id.* at 8003 ¶ 10.

[13] *See id.* at 8009 ¶ 19 (*citing Tempe Radio, Inc (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid), and *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (finding that the extremely graphic or explicit nature of references to sex with children outweighed the

or, alternatively, removing the broadcast material from the realm of indecency.

6. ***Forfeiture Calculations***. This *NAL* is issued pursuant to Section 503(b)(1) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission or to have violated Section 1464 of Title 18, United States Code, shall be liable to the United States for a forfeiture penalty.[14] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[15] The legislative history to Section 312(f)(1) clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,[16] and the Commission has so interpreted the term in the Section 503(b) context.[17]

7. The Commission's *Forfeiture Policy Statement* establishes a base forfeiture amount of $7,000 for the

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fleeting nature of the references).

[14] *See* 47 U.S.C. § 503(b)(1)(B) & D. *See also* 47 C.F.R. 1.80(a)(1).

[15] *See* 47 U.S.C. § 312(f)(1).

[16] *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

[17] *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

transmission of indecent or obscene materials.[18] The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Act, such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[19] The statutory maximum forfeiture amount for violations that occurred in February 2003 is $27,500.[20]

III. DISCUSSION

8. ***The Programming***. The Commission received numerous complaints alleging that certain affiliates of ABC and ABC owned-and-operated stations, as listed in

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[18] *See Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); *see also* 47 C.F.R. § 1.80(b).

[19] *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01 ¶ 27.

[20] The statutory maximum amount for violations occurring after November 13, 2000, and before September 7, 2004, is $27,500. *See* 65 FR 60868-01 (2000); *see also Amendment of Section 1.80 of the Commission's Rules*, Order, 19 FCC Rcd 10945, 10946 ¶ 6 (2004) (amending rules to increase maximum penalties due to inflation since last adjustment of penalty rates).

the Attachment, broadcast indecent material during the February 25, 2003 episode of the ABC program "NYPD Blue" at 9:00 p.m. in the Central and Mountain Standard Time Zones.

9. The complaints refer to a scene at the beginning of the program, during which a woman and a boy, who appears to be about seven or eight years old, are involved in an incident that includes adult female nudity. As confirmed by a tape of the program provided by ABC, during the scene in question, a woman wearing a robe is shown entering a bathroom, closing the door, and then briefly looking at herself in a mirror hanging above a sink. The camera then shows her crossing the room, turning on the shower, and returning to the mirror. With her back to the camera, she removes her robe, thereby revealing the side of one of her breasts and a full view of her back. The camera shot includes a full view of her buttocks and her upper legs as she leans across the sink to hang up her robe. The camera then tracks her, in profile, as she walks from the mirror back toward the shower. Only a small portion of the side of one of her breasts is visible. Her pubic area is not visible, but her buttocks are visible from the side.

10. The scene shifts to a shot of a young boy lying in bed, kicking back his bed covers, getting up, and then walking toward the bathroom. The camera cuts back to the woman, who is now shown standing naked in front of

the shower, her back to the camera. The frame consists initially of a full shot of her naked from the back, from the top of her head to her waist; the camera then pans down to a shot of her buttocks, lingers for a moment, and then pans up her back. The camera then shifts back to a shot of the boy opening the bathroom door. As he opens the door, the woman, who is now standing in front of the mirror with her back to the door, gasps, quickly turns to face the boy, and freezes momentarily. The camera initially focuses on the woman's face but then cuts to a shot taken from behind and through her legs, which serve to frame the boy's face as he looks at her with a somewhat startled expression. The camera then jumps to a front view of the woman's upper torso; a full view of her breasts is obscured, however, by a silhouette of the boy's head and ears. After the boy backs out of the bathroom and shuts the door, the camera shows the woman facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area. The scene ends with the boy's voice, heard through the closed door, saying "sorry," and the woman while looking embarrassed, responds, "It's okay. No problem." The complainants contend that such material is indecent and request that the Commission impose sanctions against the licensees responsible for broadcasting this material.

11. ***Indecency Analysis.*** As an initial matter, we find that the programming at issue is within the scope of our indecency definition because it depicts sexual organs and excretory organs—specifically an adult woman's buttocks.[21] Although ABC argues, without citing any authority, that the buttocks are not a sexual organ,[22] we reject this argument, which runs counter to both case law[23] and common sense.

12. We also find that the material is, in the context presented here, patently offensive as measured by contemporary community standards for the broadcast medium. Turning to the first principal factor in our contex-

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[21] *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, 2681 ¶ 62, *vacated in part on other grounds*, 21 FCC Rcd 13299 (2006) (subsequent history omitted) ("*2006 Indecency Omnibus Order*").

[22] *See Response* at 7.

[23] *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (Supreme Court did not disturb a city's indecency ordinance prohibiting public nudity, where the buttocks was listed among other sexual organs/body parts subject to the ordinance's ban on nudity); *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256, 269 (2d. Cir. 1999) (upholding state district court's determination that Time Warner's decision to not transmit certain cable programming that it reasonably believed indecent (some of which included "close-up shots of unclothed breasts and buttocks") did not run afoul of the Constitution).

tual analysis, the scene contains explicit and graphic depictions of sexual organs. The scene depicts multiple, close-range views of an adult woman's naked buttocks. In this respect, this case is similar to other cases in which we have held depictions of nudity to be graphic and explicit.[24]

13. Turning to the second factor in our contextual analysis, although not dispositive, we find that the broadcast dwells on and repeats the sexual material. We have held that repetition and persistent focus on sexual or excretory material is a relevant factor in evaluating the potential offensiveness of broadcasts.[25] Here, the

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[24] *See, e.g., Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19235 ¶ 13 (2004) (*"Super Bowl NAL"*) (finding that a broadcast of a performer's exposed breast was graphic and explicit), *affirmed*, Forfeiture Order, 21 FCC Rcd 2760 (2006), *affirmed*, Order on Reconsideration, 21 FCC Rcd 6653 (2006), *appeal pending*. *See also Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1755 ¶ 11 (2004) (*"Young Broadcasting NAL"*) (finding that a broadcast of a performer's exposed penis was graphic and explicit), *NAL response pending*.

[25] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); *see also Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20195 ¶ 11 (2004) (*"Married By America NAL"*) (*NAL response pending*); *Entercom Seattle License, LLC*, Order on

scene in question revolves around the woman's nudity and includes several shots of her naked buttocks. The material is thus dwelled upon and repeated.

14. With respect to the third factor, we find that the scene's depiction of adult female nudity, particularly the repeated shots of a woman's naked buttocks, is titillating and shocking. ABC concedes that the scene included back and side nudity, but contends that it was "not presented in a lewd, prurient, pandering, or titillating way."[26] ABC asserts that the purpose of the scene was to "illustrate[] the complexity and awkwardness involved when a single parent brings a new romantic partner into his or her life," and that the nudity was not included to depict an attempted seduction or a sexual response from the young boy.[27] Even accepting ABC's assertions as to the purpose of the scene, they do not alter our conclusion that the scene's depiction of adult female nudity is titillating and shocking. As discussed above, the scene includes multiple, close-up views of the woman's nude buttocks, with the camera at one point panning down her naked back for a lingering shot of her buttocks. The partial views of the woman's breasts, as well as the camera shots of the boy's shocked face from

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Review, 19 FCC Rcd 9069, 9073-74 ¶ 13 (2004), *petition for recon. pending.*

[26] *See* Response at 9.

[27] *See id.* at 3-4, 9-11.

between her legs and of her upper torso from behind his head, are also relevant contextual factors that serve to heighten the titillating and shocking nature of the scene. Thus, we find that the scene in question, which included repeated and lingering images of a woman naked from the back, with close-up views of her naked buttocks, presented adult female nudity in a manner that shocks and titillates viewers.

15. Finally, we reject ABC's argument that, because of the "modest number of complaints" the network received,[28] and the program's generally high ratings,[29] the contemporary community standards of the viewing community embrace, rather than reject, this particular material. As a matter of clarification, while ABC may not have received many complaints about the program, the Commission received numerous complaints, including thousands of letters from members of various citizen advocacy groups. The Commission's indecency determinations are not governed by the number of complaints received about a given program, however, nor do they turn on whether the program or the station that broadcast it happens to be popular in its particular market.[30] Indeed, with respect to the latter factor, the fact that

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[28] *See id.* at 9, n.7.

[29] *See id.* at 9.

[30] *See The Rusk Corporation*, Notice of Apparent Liability for Forfeiture, 8 FCC Rcd 3228, 3229 (1993) (forfeiture paid).

the program is watched by a significant number of viewers serves to increase the likelihood that children were among those who may have seen the indecent broadcasts, thereby increasing the public harm from the licensees' misconduct.

16. In sum, although the broadcast of nudity is not necessarily indecent in all contexts,[31] taking into account the three principal factors in our contextual analysis, we conclude that the broadcast of the material at issue here is apparently indecent. As reviewed above, the material in this episode was explicit, dwelled upon, and shocking, pandering and titillating. The complained-of material was broadcast by the licensees listed in the Attachment within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under Section 73.3999 of the Commission's rules.[32] Although ABC included in the program a warning that "this police drama contains adult language and partial nudity,"[33] the Supreme Court has ruled that such warnings are not necessarily effective

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[31] *Compare WPBN/WTOM MO&O*, 15 FCC Rcd at 1840-41 ¶¶ 8-13 (finding that nudity in the broadcast of the movie "Schindler's List" was not indecent because it was not patently offensive in context) *with Young Broadcasting NAL*, 19 FCC Rcd at 1756, ¶ 14 (finding that exposure of male genitalia was patently offensive because it was gratuitous and apparently intended to shock and titillate the audience).

[32] *See* 47 C.F.R. § 73.3999.

[33] Response at 10-11.

because the audience is constantly changing stations.[34] Therefore, notwithstanding the warning, there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable.[35]

17. ***Forfeiture Calculation***. We find that the ABC affiliates and ABC owned-and-operated stations listed in the Attachment consciously and deliberately broadcast the programming at issue here. Accordingly, we find that each broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of Section 503(b)(1) of the Act, and subject to forfeiture.

18. We therefore turn to the proposed forfeiture amount, which is based on the factors enumerated in Section 503(b)(2)(D) of the Act and the facts and circumstances of this case. For the following reasons, we find that $27,500 is an appropriate proposed forfeiture for the material found to be apparently indecent in this case. The scene depicts a nude woman with her buttocks entirely exposed. The material was prerecorded, and ABC or its affiliates could have edited or declined the content prior to broadcast.[36] Although ABC included a

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[34] *See Pacifica*, 438 U.S. at 748-49.

[35] *See Action for Children's Television v. FCC*, 58 F. 3d 654, 660-63 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1072 (1996).

[36] *See Married By America NAL*, 19 FCC Rcd at 20196 ¶ 16.

warning, we find that a lower forfeiture is not warranted here in light of all the circumstances surrounding the apparent violation, including the shocking and titillating nature of the scene. On balance and in light of all of the circumstances, we find that a $27,500 forfeiture amount for each station would appropriately punish and deter the apparent violation in this case. Therefore, we find that each licensee listed in the Attachment is apparently liable for a proposed forfeiture of $27,500 for each station that broadcast the February 25, 2003, episode of "NYPD Blue" prior to 10 p.m.[37]

19. Although we are informed that other stations not mentioned in any complaint also broadcast the complained-of episode of "NYPD Blue," we propose forfeitures against only those licensees whose broadcasts of the material between 6 a.m. and 10 p.m. were actually the subject of viewer complaints to the Commission. This result is consistent with the approach set forth

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[37] The fact that the stations in question may not have originated the programming is irrelevant to whether there is an indecency violation. *See Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, Notice of Proposed Rulemaking, 10 FCC Rcd 11951,11961, ¶ 20 (1995) (internal quotation omitted) ("We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.").

by the Commission in its most recent indecency orders.[38] As indicated in those orders, our commitment to an appropriately restrained enforcement policy justifies this more limited approach toward the imposition of forfeiture penalties. Accordingly, we propose forfeitures as set forth in the Attachment.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules, that the licensees of the stations that are affiliates of the ABC Television Network and of the stations owned and operated by ABC, as enumerated in the Attachment, are hereby NOTIFIED of their APPARENT LIABILITY FOR FORFEITURE in the amount of $27,500 per station for willfully violating 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules by their broadcast of the program "NYPD Blue" on February 25, 2003.

21. IT IS FURTHER ORDERED that a copies of this *NAL* shall be sent by Certified Mail, Return Receipt Requested, to John W. Zucker, Senior Vice President, Law & Regulation, ABC Inc., 77 West 66th Street, New York, New York 20024, and to Susan L. Fox, Vice President, Government Relations, The Walt Disney

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[38] *See 2006 Indecency Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32.

Company, 1150 17th Street, N.W., Suite 400, Washington, D.C. 20036, and to the licensees of the stations listed in the Attachment, at their respective addresses noted therein.

22. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, that not later than February 11, 2008, each licensee identified in the Attachment SHALL PAY the full amount of its proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of their proposed forfeiture.

23. Payment of the forfeitures must be made by check or similar instrument, payable to the order of the Federal Communications Commission. Payments must include the relevant NAL/Acct. No. and FRN No. referenced in the Attachment. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

24. The responses, if any, must be mailed to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communi-

cations Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554, and MUST INCLUDE the relevant NAL/Acct. No. referenced for each proposed forfeiture in the Attachment hereto.

25. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

26. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Associate Managing Director—Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[39]

27. Accordingly, IT IS ORDERED that the complaints in this *NAL* proceeding ARE GRANTED to the extent indicated herein, AND ARE OTHERWISE DE-

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[39] *See* 47 C.F.R. § 1.1914.

NIED, and the complaint proceeding IS HEREBY TERMINATED.[40]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[40] Consistent with Section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, the only parties to such proceeding will be the licensees specified in the Attachment.

ATTACHMENT

Proposed Forfeitures For February 25, 2003
Broadcasts Of "NYPD Blue"

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Cedar Rapids Television Company, 2nd Avenue at 5th Street, NE, Cedar Rapids, IA 52401	0002 5894 89	2008 3208 0013	KCRG-TV Cedar Rapids, IA	9719	$27,500
Centex Television Limited Partnership, P. O. Box 2522, Waco, TX 76702	0001 6757 19	2008 3208 0014	KXXV(TV) Waco, TX	9781	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Channel 12 of Beaumont, Inc., 525 Interstate Highway, 10 South, Beaumont, TX 77701	0006 5873 07	2008 3208 0015	KBMT(TV) Beaumont, TX	10150	$27,500
Citadel Communications, LLC, 44 Pondfield Road, Suite 12, Bronxville, NY 10708	0003 7574 81	2008 3208 0016	KLKN(TV) Lincoln, NE	11264	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
KLTV/KTRE License Subsidiary, LLC, 201 Monroe Street, RSA Tower 20th Floor, Montgomery, AL 36104	0015 7983 41	2008 3208 0017	KLTV(TV) Tyler, TX	68540	$27,500
Duhamel Broadcasting Enterprises, 518 St. Joseph Street,, Rapid City, SD 57701	0002 4333 40	2008 3208 0018	KOTA-TV Rapid City, SD	17688	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Forum Communications Company, 301 8th Street South, P. O. Box 2466, Fargo, ND 58103	0002 4800 85	2008 3208 0019	WDAY-TV Fargo, ND	22129	$27,500
Gray Television Licensee Corp., 1500 North West Street, Wichita, KS 67203	0002 7460 22	2008 3208 0020	KAKE-TV Wichita, KS	65522	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Gray Television Licensee, Inc., P. O. Box 10, Wichita, KS 67201	0002 7460 22	2008 3208 0021	KLBY(TV) Colby, KS	65523	$27,500
KSTP-TV, LLC, 3415 University Avenue, West, St. Paul, MN 55114-2099	0009 7696 21	2008 3208 0022	KSTP-TV St. Paul, MN	28010	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
KATC Communications, Inc., 1103 Eraste Landry Road, Lafayette, LA 70506	0003 8222 85	2008 3208 0023	KATC(TV) Lafayette, LA	33471	$27,500
KATV, LLC, P. O. Box 77, Little Rock, AR 72203	0001 6944 62	2008 3208 0024	KATV(TV) Little Rock, AR	33543	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
KDNL Licensee, LLC, c/o Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128	0002 1444 59	2008 3208 0025	KDNL-TV St. Louis, MO	56524	$27,500
KETV Hearst-Argyle Television, Inc., c/o Brooks, Pierce, et al, P. O. Box 1800, Raleigh, NC 27602	0003 7998 55	2008 3208 0026	KETV(TV) Omaha, NE	53903	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
KFBB Corporation, L.L.C., c/o Wooster Republican Printing Company, 40 S Linden Ave, Alliance, OH 44601-2447	0011 0942 81	2008 3208 0027	KFBB-TV Great Falls, MT	34412	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
KHBS Hearst-Argyle Television, Inc., c/o Brooks, Pierce, et al, P. O. Box 1800, Raleigh, NC 27602	0001 5870 88	2008 3208 0028	KHOG-TV Fayetteville, AR	60354	$27,500
KMBC Hearst-Argyle Television, Inc., c/o Brooks, Pierce, et al, P.O. Box 1800, Raleigh, NC 27602	0001 6759 74	2008 3208 0029	KMBC-TV Kansas City, MO	65686	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
KSWO Television Company, Inc., P. O. Box 708, Lawton, OK 73502	0001 6992 48	2008 3208 0030	KSWO-TV Lawton, OK	35645	$27,500
KTBS, Inc., P. O. Box 44227, Shreveport, LA 71104	0003 7274 19	2008 3208 0031	KTBS-TV Shreveport, LA	35652	$27,500
KTRK Television, Inc., 77 W. 66th Street, Floor 16, New York, NY 10023-6201	0012 4801 09	2008 3208 0032	KTRK-TV Houston, TX	35675	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
KTUL, LLC, 3333 S. 29th West Avenue, Tulsa, OK 74107	0001 6944 13	2008 3208 0033	KTUL(TV) Tulsa, OK	35685	$27,500
KVUE Television, Inc., 400 South Record Street, Dallas, TX 75202	0001 5455 81	2008 3208 0034	KVUE(TV) Austin, TX	35867	$27,500
Louisiana Television Broadcasting, LLC, P. O. Box 2906, Baton Rouge, LA 70821	0001 7143 44	2008 3208 0035	WBRZ-TV Baton Rouge, LA	38616	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
McGraw-Hill Broadcasting Company, 123 Speer Boulevard, Denver, CO 80203	0003 4768 27	2008 3208 0036	KMGH-TV Denver, CO	40875	$27,500
Media General Communication Holdings, LLC,, 333 E. Franklin Street, Richmond, VA 23219-2213	0015 7512 17	2008 3208 0037	WMBB(TV) Panama City, FL	66398	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Mission Broadcasting, Inc., 544 Red Rock Drive, Wadsworth, OH 44281	0004 2848 99	2008 3208 0038	KODE-TV Joplin, MO	18283	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Mississippi Broadcasting Partners, c/o Anne Swanson, Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW, Suite 800, Washington DC 20036-6802	0003 8287 53	2008 3208 0039	WABG-TV Greenwood, MS	43203	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039	0009 9618 89	2008 3208 0040	WDHN(TV) Dothan, AL	43846	$27,500
New York Times Management Services Co. c/o New York Times Co. 229 W. 43rd Street New York, NY 10036-3913	0003 4815 87	2008 3208 0041	WQAD-TV Moline, IL	73319	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039	0009 9618 89	2008 3208 0042	KQTV(TV) St. Joseph, MO	20427	$27,500
Northeast Kansas Broadcast Service, Inc., 2121 S.W. Chelsea Avenue, Topeka, KS 66604	0001 8417 66	2008 3208 0043	KTKA-TV Topeka, KS	49397	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
NPG of Texas, L.P., 4140 Rio Bravo, El Paso, TX 79902	0006 5480 28	2008 3208 0044	KVIA-TV El Paso, TX	49832	$27,500
Ohio/Oklahoma Hearst-Argyle Television, c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0001 5876 09	2008 3208 0045	KOCO-TV Oklahoma City, OK	12508	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Piedmont Television of Huntsville License, LLC, c/o Piedmont Television Holdings LLC, 7621 Little Avenue, Suite 506, Charlotte, NC 28226	0004 0634 83	2008 3208 0046	WAAY-TV Huntsville, AL KSPR(TV) Springfield, MO	57292 35630	$55,000

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Pollack/Belz Communications Co., Inc., 5500 Poplar Lane, Memphis, TN 38119-3716	0006 0962 00	2008 3208 0047	KLAX-TV Alexandria, LA	52907	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Post-Newsweek Stations, San Antonio, Inc., c/o Post-Newsweek Stations, 550 West Lafayette Boulevard, Detroit, MI 48226-3140	0002 1499 53	2008 3208 0048	KSAT-TV San Antonio, TX	53118	$27,500
Scripps Howard Broadcasting Co., 312 Walnut Street, Cincinnati, OH 45202	0012 4876 09	2008 3208 0049	KNXV-TV Phoenix, AZ	59440	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Southern Broadcasting, Inc., P. O. Box 1645, Tupelo, MS 38802	0005 4116 32	2008 3208 0050	WKDH(TV) Houston, MS	83310	$27,500
Tennessee Broadcasting Partners, c/o Russell Schwartz, One Television Place, Charlotte, NC 28205	0003 8286 96	2008 3208 0051	WBBJ-TV Jackson, TN	65204	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Tribune Television New Orleans, Inc., 1 Galleria Boulevard, Suite 850, Metairie, LA 70001	0002 8475 64	2008 3208 0052	WGNO(TV) New Orleans, LA	72119	$27,500
WAPT Hearst-Argyle TV, Inc., (CA Corp.), P. O. Box 1800, Raleigh, NC 27602	0005 0088 67	2008 3208 0053	WAPT(TV) Jackson, MS	49712	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
WDIO-TV, LLC, 3415 University Avenue West, St. Paul, MN 55114-2099	0004 1991 39	2008 3208 0054	WDIO-TV Duluth, MN	71338	$27,500
WEAR Licensee, LLC, Pillsbury, Winthrop, Shaw, Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128	0004 9709 35	2008 3208 0055	WEAR-TV Pensacola, FL	71363	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
WFAA-TV, Inc., 400 South Record Street, Dallas, TX 75202	0001 6514 96	2008 3208 0056	WFAA-TV Dallas, TX	72054	$27,500
WISN Hearst-Argyle TV, Inc. (CA Corp.), P. O. Box 1800, Raleigh, NC 27602	0003 7926 03	2008 3208 0057	WISN-TV Milwaukee, WI	65680	$27,500
WKOW Television, Inc., P. O. Box 909, Quincy, IL 62306	0004 3836 83	2008 3208 0058	WKOW-TV Madison, WI	64545	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
WKRN, G.P., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0005 0150 37	2008 3208 0059	WKRN-TV Nashville, TN	73188	$27,500
WLS Television, Inc., 77 W. 66th Street, Floor 16, New York, NY 10023-6201	0003 4713 15	2008 3208 0060	WLS-TV Chicago, IL	73226	$27,500
WSIL-TV, Inc., 5009 South Hulen, Suite 101, Fort Worth, TX 76132-1989	0002 8081 37	2008 3208 0061	WSIL-TV Harrisburg, IL	73999	$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
WXOW-WQOW Television, Inc., P.O. Box 909, Quincy, IL 62306	0005 0122 16	2008 3208 0062	WXOW-TV La Crosse, WI	64549	$27,500
Young Broadcasting of Green Bay, Inc., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0004 9949 84	2008 3208 0063	WBAY-TV Green Bay, WI	74417	$27,500

STATEMENT OF COMMISSIONER DEBORAH TAYLOR TATE

Our action today should serve as a reminder to all broadcasters that Congress and American families continue to be concerned about protecting children from harmful material and that the FCC will enforce the laws of the land vigilantly. In fact, pursuant to the Broadcast Decency Act of 2005, Congress increased the maximum authorized fines ten-fold. The law is simple. If a broadcaster makes the decision to show indecent programming, it must air between the hours of 10 p.m. and 6 a.m. This is neither difficult to understand nor burdensome to implement.

APPENDIX G

1. 18 U.S.C. 1464 provides:

Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

2. 47 U.S.C. 312 provides in relevant part:

Administrative sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission au-

thorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

* * * * *

3. 47 U.S.C. 503 provides in relevant part:

Forfeitures

* * * * *

(b) **Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period**

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or oth-

er agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

* * * * *

4. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, provides:

FCC REGULATIONS.—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

5. 47 C.F.R. 73.3999 provides:

Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).

(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.

(b) No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAY 23 2011
OFFICE OF THE CLERK

No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

ABC, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ABC, INC.; KTRK TELEVISION, INC.; AND WLS TELEVISION, INC.

JOHN W. ZUCKER
ABC, INC.
77 West 66th Street
New York, N.Y. 10023
(212) 456-7387

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL S. VOLCHOK
MICAH S. MYERS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTION PRESENTED

Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.

RULE 29.6 STATEMENT

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

KTRK Television, Inc. and WLS Television, Inc. are indirect, wholly owned subsidiaries of ABC, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

ARGUMENT 7

I. THIS COURT'S REVIEW IS UNWARRANTED 7

A. The Second Circuit's Vagueness Holding Is A Correct And Straightforward Application Of This Court's Precedent 9

1. The FCC's Current Enforcement Of §1464 Is Vague And Has A Severe Chilling Effect 9

2. Petitioners' Arguments Regarding The Second Circuit's Vagueness Ruling Lack Merit 16

B. The Second Circuit's Decisions Do Not Conflict With *Pacifica* Or The D.C. Circuit's *ACT* Cases 22

C. The Second Circuit's Judgment Is Correct Independent Of Its Vagueness Analysis 25

D. Petitioners Greatly Overstate The Consequences Of The Second Circuit's Ruling 32

II. IF CERTIORARI IS GRANTED, THE QUESTION PRESENTED SHOULD ENCOMPASS ALL AVAILABLE GROUNDS FOR AFFIRMANCE 34

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Page(s)

Action for Children's Television v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) 24, 26, 28

Action for Children's Television v. *FCC*, 932 F.2d 1504 (D.C. Cir. 1991) 24

Action for Children's Television v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) 24, 29

Ashcroft v. *ACLU*, 542 U.S. 656 (2004) 26

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 15

CBS Corp. v. *FCC*, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, 129 S. Ct. 2176 (2009). 3

Citizens United v. *FEC*, 130 S. Ct. 876 (2010) 30

Cohen v. *California*, 403 U.S. 15 (1971) 19

Consumer Electronics Ass'n v. *FCC*, 347 F.3d 291 (D.C. Cir. 2003) 31

Denver Area Educational Telecommunications Consortium, Inc. v. *FCC*, 518 U.S. 727 (1996) 26, 27, 29, 30

Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 28

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 17, 18, 23, 29-32

FCC v. *League of Women Voters of California*, 468 U.S. 364 (1984) 27, 31

TABLE OF AUTHORITIES—Continued

Page(s)

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) 1, 2, 17, 23, 28, 29

Fox Television Stations, Inc. v. *FCC*, 613 F.3d 317 (2d Cir. 2010) 7

Gentile v. *State Bar of Nevada*, 501 U.S. 1030 (1991) 9

Ginsberg v. *New York*, 390 U.S. 629 (1968) 28

Gooding v. *Wilson*, 405 U.S. 518 (1972) 14

Holder v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010) 18, 19

NAACP v. *Button*, 371 U.S. 415 (1963) 16

NBC, Inc. v. *United States*, 319 U.S. 190 (1943) 30

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 29, 30

Reno v. *ACLU*, 521 U.S. 844 (1997) 2, 9, 10, 12, 26, 27

Sable Communications of California, Inc. v. *FCC*, 492 U.S. 115 (1989) 2, 23, 26, 27

Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994) 14, 29

United States v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) 14, 26-28

Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 9, 16

Yeager v. *United States*, 129 S. Ct. 2360 (2009) 25

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

United States v. *Fox Television Stations, Inc.*, No. 08-cv-584 (D.D.C.) 25

STATUTES AND REGULATIONS

18 U.S.C. §1464 1

47 U.S.C.
§223 (2003) 10
§503 ..... 1, 15

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 26

47 C.F.R. §73.3999 ..... 7, 33

ADMINISTRATIVE DECISIONS

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542 (2009) 30

Citadel Broadcasting Co., 16 F.C.C.R. 11839 (2001) 20

Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043 (1987), *aff'd, Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989) 31

Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507 (2005) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005, 21 F.C.C.R. 2664 (2006), *vacated and remanded, Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009) 11-13, 20, 21, 33

Implementation of Section 551 of the Telecommunications Act of 1996, 13 F.C.C.R. 8232 (1998) 26

Implementation of the Child Safe Viewing Act, 24 F.C.C.R. 11413 (2009) 26, 30

Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 & Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (2001) 19, 20

Infinity Broadcasting Corp. of Pennsylvania, 2 F.C.C.R. 2705 (1987), *reconsideration granted in part, Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C.R. 930 (1987), *aff'd in part, vacated in part, and remanded, Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) 3

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TABLE OF AUTHORITIES—Continued

Page(s)

Letter from David Molina to Norman Goldstein, FCC File No. 97110028 (May 26, 1999) 11, 20

Pacifica Foundation, Inc., 2 F.C.C.R. 2698 (1987), *reconsideration granted in part, Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C.R. 930 (1987), *aff'd in part, vacated in part, and remanded, Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) 3

Rusk Corp. Radio Station KLOL(FM), 5 F.C.C.R. 6332 (1990) 20

WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838 (2000) 20

OTHER AUTHORITIES

Berresford, John. W., *The Scarcity Rationale for Regulating Traditional Broadcasting* (Mar. 2005), *available at* http://www.fcc.gov/ownership/materials/already-released/scarcity030005.pdf (last visited May 23, 2011) 31

Brief for the United States, *FCC* v. *Pacifica Foundation*, No. 77-528 (U.S. Mar. 27, 1978), *available at* 1978 WL 206846 3

FCC V-Chip, http://fcc.gov/vchip (last visited May 23, 2011) 4, 5, 26

HFPA—Award Search, www.goldenglobes.org/browse/film/24682 (last visited May 23, 2011) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Peabody Awards, www.peabody.uga.edu/winners/details.php?id=157 (last visited May 23, 2011) 4

Peabody Awards, www.peabody.uga.edu/winners/search.php (last visited May 23, 2011) 4

Primetime Emmy® Award Database—Emmys.com, http://www.emmys.com/award_history_search (last visited May 23, 2011) 4

IN THE

Supreme Court of the United States

No. 10-1293

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR ABC, INC.; KTRK TELEVISION, INC.; AND WLS TELEVISION, INC.

STATEMENT

1. Under 18 U.S.C. §1464, it is a criminal offense to broadcast "any ... indecent ... language." The Federal Communications Commission can impose civil forfeitures for violations of this provision. *See* 47 U.S.C. §503(b)(1). In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court held in a splintered decision that the Commission had the authority to enforce §1464's indecency prohibition against a midday radio broadcast of George Carlin's "Filthy Words" monologue. The monologue consisted of seven expletives being "repeated over and over as a sort of verbal shock treat-

ment" for nearly twelve minutes. *Id.* at 757 (Powell, J., concurring in part and concurring in the judgment).

Section 1464's prohibition on indecent broadcasts implicates serious constitutional concerns, because "expression which is indecent but not obscene is protected by the First Amendment." *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). Recognizing this point, this Court, both in *Pacifica* itself and in later cases, has "emphasize[d] the narrowness of [*Pacifica*'s] holding." *Pacifica*, 438 U.S. at 750; *see also Reno* v. *ACLU*, 521 U.S. 844, 870 (1997) (noting "our 'emphatically narrow holding' in *Pacifica*" (quoting *Sable Commc'ns*, 492 U.S. at 127)). More specifically, the Court in *Pacifica* stated that the question before it was simply "whether the ... Commission has *any* power to regulate a radio broadcast that is indecent but not obscene." 438 U.S. at 729 (emphasis added); *accord id.* at 744 (plurality opinion). And it stressed that its "review is limited to the question whether the Commission has the authority to proscribe this particular broadcast." *Id.* at 742 (plurality opinion).

Justices Powell and Blackmun, moreover, whose votes were necessary to uphold the Commission's indecency finding, made clear that the Court was not giving the Commission "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Pacifica*, 438 U.S. at 759-760 (Powell, J., concurring in part and concurring in the judgment). They also stated that they did not expect the Commission's indecency determination to chill broadcasters' expression because "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 762 n.4 (citing the Commission's brief); *see also id.* at 771 (Brennan, J., dissenting) ("[T]o dispel the specter of ... censorship, and to diffuse

Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case.").[1]

The Commission initially adhered to *Pacifica*'s message regarding the need for restraint. For example, it brought no indecency-enforcement actions between 1978 and 1987. *See Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, 930 (¶4) (1987) (subsequent history omitted). And even when it chose in 1987 to expand indecency enforcement beyond Carlin's seven "filthy words," *see Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (¶12) (1987) (subsequent history omitted), the Commission stated that "the First Amendment dictate[s] a careful and restrained approach" to regulation of broadcast indecency, *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705, 2705 (¶6) (1987) (subsequent history omitted). In recent years, however, the Commission has abandoned this restraint, adopting a much more aggressive approach to broadcast-indecency enforcement. *See* Pet. App. 7a-8a & nn.2-3; *CBS Corp.* v. *FCC*, 535 F.3d 167, 177 (3d Cir. 2008), *vacated and remanded on other grounds*, 129 S. Ct. 2176 (2009).

2a. In 2008, the Commission issued a forfeiture order finding an episode of *NYPD Blue* indecent because it showed a woman's buttocks for seven seconds in a non-sexual context. *See* Pet. App. 126a-214a. *NYPD Blue*, which featured the lives of New York City police detectives, aired on the ABC Television Network from 1993 to 2005. Pet. App. 127a. The show was one of the

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[1] The United States filed a separate brief in *Pacifica*, arguing that the Commission's indecency finding was unconstitutional. *See* U.S. Br. 24-39, *Pacifica*, No. 77-528 (U.S. Mar. 27, 1978), *available at* 1978 WL 206846.

most acclaimed dramas in television history, garnering twenty Emmy awards, four Golden Globes, and two Peabodys, among other accolades.[2] Key to the show's success was its realistic portrayal of the dangers and difficulties faced by its characters in their professional and personal lives. One Peabody Award citation, for example, lauded the show for "provid[ing] gritty and realistic insight into the dilemmas and tragedies which daily confront those who spend their lives in law enforcement."[3]

To achieve this compelling realism, *NYPD Blue* employed coarse language; dramatic depictions of street violence; and mature themes, plotlines, and visual elements, including occasional nudity. To inform parents and others about the nature of the material being broadcast, ABC began almost every episode with a prominent visual and verbal advisory detailing the episode's mature content. After the TV Parental Guideline ratings were adopted in 1997, ABC also gave each episode a TV-14 rating, meaning "Parents Strongly Cautioned—This program contains some material that many parents would find unsuitable for children under 14 years of age."[4] Episodes were subsequently given appropriate content descriptors as well (language, violence, etc.), and coded to allow blocking with the V-chip,

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[2] *See* Primetime Emmy® Award Database—Emmys.com, http://www.emmys.com/award_history_search; HFPA—Awards Search, www.goldenglobes.org/browse/film/24682; Peabody Awards, www.peabody.uga.edu/winners/search.php (all Web pages cited in the brief were last visited May 23, 2011).

[3] Peabody Awards, http://www.peabody.uga.edu/winners/details.php?id=157.

[4] FCC V-Chip, http://fcc.gov/vchip.

a device that empowers viewers to block broadcasts based on their age rating or content descriptors, *see* FCC V-Chip, *supra* n.4; *see also infra* pp.26-27.

b. The episode at issue here was broadcast in February 2003, during the last hour of primetime television—from 10 to 11 pm in the Eastern and Pacific time zones and from 9 to 10 pm in the Central and Mountain time zones. *See* Pet. App. 127a. Like many episodes, it explored the personal life of a leading character, Detective Andy Sipowicz. As the show's regular viewers knew, Sipowicz's wife had died several seasons earlier, leaving him alone to raise their young son Theo. Sipowicz later became romantically involved with another detective, Connie McDowell. As their relationship developed, the two often worried about its effect on Theo, a theme addressed in multiple episodes. Shortly before the episode at issue here, Sipowicz and Theo moved into McDowell's apartment.

The broadcast began with a full-screen, eight-second visual and audio advisory informing viewers that "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED."[5] The advisory and the program's opening frames also displayed a TV-14(DLV) rating. The episode thus would have been blocked from any television with a V-chip set for broadcasts bearing either that age rating or one of several content descriptions (intensely suggestive dialogue, strong coarse language, or intense violence). The advisory was followed by a 30-second recap of prior episodes and then immediately by the scene at issue.

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[5] A DVD copy of the episode was submitted with the petition.

The scene begins with McDowell entering her bathroom to take a shower. Like anyone preparing to shower, she turns on the water and disrobes. Moments later, Theo, first shown waking up and getting out of bed, opens the bathroom door, unaware that McDowell is inside. Both characters are startled and embarrassed. McDowell covers herself with her arms, and Theo quickly retreats, closing the door as he apologizes.

To convey vividly the embarrassment this encounter caused, the scene briefly depicts McDowell naked from behind and the side (hence the prominent advisory about partial nudity). In two shots before Theo opens the bathroom door, McDowell's buttocks are fully visible for five seconds and partially visible for two seconds. McDowell's pubic area is never shown, and her breasts are visible only from the side or otherwise obscured. At no point in the scene does either character engage in sexual or excretory activity, or display any sexual interest.[6]

3. Almost a year after the episode aired, FCC staff sent ABC a letter of inquiry stating that the episode had been the subject of (unspecified and undisclosed) indecency complaints. Pet. App. 127a. ABC promptly sent the Commission a tape and transcript of the episode, along with letters explaining why the episode contained no indecent material. *Id.*

Four years later, the Commission issued a notice of apparent liability, stating that the seven-second depic-

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[6] During the scene's taping, the actress playing McDowell wore opaque fabric over her pubic area and parts of her breasts, obscuring them from the actor who played Theo. Both the actor's mother and a certified studio teacher/welfare worker were present during the rehearsal and filming of the relevant parts of the scene.

tion of McDowell's buttocks was indecent. *See* Pet. App. 215a-262a. The Commission reaffirmed that determination in a forfeiture order and imposed the then-maximum fine of $27,500 on each of the 45 stations—two owned by ABC, Inc. and 43 affiliated with the ABC network—that had broadcast the episode in the Central or Mountain time zone, for a total fine of nearly $1.24 million. *See* Pet. App. 126a-214a. (As noted, the episode aired at 10 pm in the Eastern and Pacific time zones, within the 10-pm-to-6-am "safe harbor." *See* 47 C.F.R. §73.3999(b).)

ABC paid the fine and sought review of the forfeiture order by the Second Circuit. While the case was pending, a different Second Circuit panel held, in *Fox Television Stations, Inc.* v. *FCC*, 613 F.3d 317 (2d Cir. 2010), another case challenging Commission indecency findings, that the Commission's indecency-enforcement policy is unconstitutionally vague. *See* Pet. App. 1a-34a. The panel assigned to ABC's challenge then directed the parties to file supplemental briefs addressing the impact of *Fox*. Petitioners' supplemental brief stated that there were no material factual distinctions between *Fox* and this case, and thus that under the *Fox* decision, "the Commission's indecency policy is unconstitutionally vague ... as applied to ... this case." Supp. Br. for the FCC and United States 3, *ABC, Inc.* v. *FCC*, No. 08-0841-ag (2d Cir. Aug. 23, 2010). The *ABC* panel agreed, invalidating the Commission's forfeiture order on the strength of *Fox*. *See* Pet. App. 124a.

ARGUMENT

I. THIS COURT'S REVIEW IS UNWARRANTED

Certiorari should be denied. In concluding that the Commission's current indecency policy is impermissibly vague and has a powerful chilling effect on broadcast-

ers' constitutionally protected expression, the court of appeals faithfully applied this Court's relevant precedent. Petitioners' critique of the Second Circuit's vagueness ruling is meritless, as is their claim that the ruling conflicts with *Pacifica* and with the D.C. Circuit's *Action for Children's Television* (*ACT*) decisions.

Furthermore, these cases would be a poor vehicle to address the Second Circuit's vagueness holding even if it otherwise warranted this Court's attention, because the Second Circuit's invalidation of the Commission's indecency findings is correct for three reasons independent of the vagueness holding. *First*, the availability of the V-chip, which empowers viewers to block unwanted programs effectively, means the government cannot rely on content-based speech restrictions rather than that less-restrictive alternative. *Second*, even under *Pacifica*, the First Amendment simply does not allow the government to proscribe the brief and non-sexual depiction of buttocks at issue here. *Third*, strict scrutiny is the proper standard here because *Pacifica* and other cases authorizing reduced First Amendment scrutiny of content-based restrictions on broadcasters' expression are not viable today.

Finally, in seeking to secure immediate review by this Court, petitioners greatly overstate the implications of the Second Circuit's decisions. The court of appeals has not prevented the Commission from enforcing the indecency statute. Indeed, the court expressly invited the Commission to develop a more consistent and restrained approach to indecency enforcement that could pass constitutional muster.[7]

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[7] ABC joins the *Fox* respondents' brief in opposition.

A. The Second Circuit's Vagueness Holding Is A Correct And Straightforward Application Of This Court's Precedent

1. The FCC's Current Enforcement Of §1464 Is Vague And Has A Severe Chilling Effect

The court of appeals correctly concluded that the Commission's current indecency policy is unconstitutionally vague. The Commission in recent years has applied its indecency standard in a starkly inconsistent and contradictory manner, leaving a body of incoherent decisions that provides broadcasters with no genuine guidance as to what constitutes impermissible indecency. *See Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). This inconsistent decisionmaking, moreover, appears to be driven by the commissioners' personal views about the merits of particular programming. That is wholly improper. *See Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). And as the court of appeals explained, the Commission's vague policy has had a strong chilling effect on broadcasters' constitutionally protected expression. *See Reno*, 521 U.S. at 871-872 ("The vagueness of ... a [content-based] regulation raises special First Amendment concerns because of its obvious chilling effect[.]").

a. This Court has already held language virtually identical to the Commission's indecency standard to be impermissibly vague. "The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." Pet. App. 45a (¶15). In *Reno*, this Court addressed a statute banning on-line distribution of material that "in con-

text, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. §223(d)(1) (2003). The Court concluded that this standard "lacks the precision that the First Amendment requires when a statute regulates the content of speech," 521 U.S. at 874, noting particular concern with "the vagueness inherent in the open-ended term 'patently offensive,'" *id.* at 873.

In its orders here, the Commission dismissed *Reno* on the ground that "*Reno* expressly distinguished *Pacifica*." Pet. App. 77a (¶45), 173a (¶41). As the Second Circuit explained, however, *Reno* distinguished *Pacifica* regarding "'the level of First Amendment scrutiny that should be applied to this medium,' not ... whether the statute was unconstitutionally vague. Broadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny." Pet. App. 21a (quoting *Reno*, 521 U.S. at 870). The Commission's indecency standard is therefore unconstitutionally vague unless there is a meaningful basis to distinguish it from the standard at issue in *Reno* (a case not even cited in the petition).

b. Petitioners argued below that the Commission had provided additional guidance to broadcasters by promulgating three principal patent-offensiveness factors (*reprinted in* Pet. 7) and by applying its generic indecency standard to a wide variety of different broadcasts. *See* Pet. App. 23a. The court of appeals stated that the three factors were indeed a potentially material distinction, and hence that *Reno* did not automatically control. *See* Pet. App. 21a. But the court went on to explain that in the myriad decisions petitioners invoked, the Commission had applied the three factors

(and its indecency standard more generally) in an inconsistent and contradictory manner, and that this impermissibly chilled constitutionally protected expression because broadcasters could not ascertain what material was prohibited and what was not. *See* Pet. App. 23a-34a.

That analysis was entirely correct. As this case shows, the Commission in recent years has engaged in patently inconsistent applications of its indecency standard in general and the patent-offensiveness factors in particular. For example, the Commission found that as to the seven-second display of buttocks here, the second patent-offensiveness factor—whether the material is dwelled on or repeated at length—"provides some support" for a patent offensiveness finding. Pet. App. 142a. Yet in another case, involving an eight-second depiction of buttocks, the Commission cited the depiction's "brevity" in deeming the material not indecent. *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 2664, 2719 (¶226) (2006) (subsequent history omitted) (hereafter *Omnibus Order*); *see also* Letter from David Molina to Norman Goldstein, FCC File No. 97110028 (May 26, 1999) (rejecting indecency complaint regarding a broadcast of the World War II movie *Catch-22* partly on the ground that the depictions of nudity—which exceeded 40 seconds—were "very brief"). The Commission has given no adequate explanation for this inconsistency, instead attempting to justify the different ultimate outcomes in the two cases on other grounds. But the fact that the Commission can point to some *other* difference between broadcasts does not justify its inconsistent application of one or more of the factors that purportedly give additional content to its indecency standard and thereby avoid the vagueness

"inherent" in it. *Reno*, 521 U.S. at 873. If the Commission is effectively ignoring the factors and simply making gestalt indecency determinations, then the factors are not a basis for distinguishing the Commission's indecency standard from the one in *Reno*.

Other instances of Commission inconsistency abound. *See* Pet. App. 26a. For example, the Commission has declared that every use of "fuck" or its many variants "inherently has a sexual connotation," and likewise that every use of "shit" or its many variants (including "bullshit") "invariably invokes a coarse excretory image." *Omnibus Order*, 21 F.C.C.R. at 2699 (¶138). Yet it has treated other comparable words differently. It has made clear, for instance, that the phrase "a lot of crap" is less likely to be deemed indecent because it (purportedly unlike "bullshit") is "fairly commonly used in a non-sexual, non-excretory manner." *Id.* at 2694 n.180 (¶120). The Commission has failed to explain this inconsistency, which leaves broadcasters with no way to know what other words three commissioners will decide "invariably" refer to sex or excrement and what words instead are "commonly used in a non-sexual, non-excretory manner."

Similarly, the Commission has declared that single uses of "dick" or "dickhead" in earlier *NYPD Blue* episodes were not patently offensive because they were neither "sufficiently vulgar, explicit, or graphic," nor "sufficiently shocking." *Omnibus Order*, 21 F.C.C.R. at 2696-2697 (¶127). Yet in the next breath it declared that individual uses of "bullshit" in *NYPD Blue* episodes *were* patently offensive, because each was "vulgar, graphic and explicit," and "shocking and gratuitous." *Id.* at 2697 (¶¶128, 130). Again, this form of

"analysis" does not inform broadcasters what is permitted and what is not.[8]

Most troubling is the Commission's related assertion that it can rest indecency determinations on its own artistic judgments. For example, the Commission declared that a broadcast of the World War II film *Saving Private Ryan*, which included pervasive use of "fuck," "shit," and other expletives, was not indecent because those expletives were "integral to the film[]" and "[e]ssential to the ability of the filmmaker to convey" his message, and because omitting them "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512-4513 (¶14) (2005). Yet the Commission held that much-more-limited expletives in *The Blues*, a documentary about jazz musicians, were indecent because the documentary's educational purposes "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." *Omnibus Order*, 21 F.C.C.R. at 2686 (¶82). Similarly, the Commission held that a single "bullshit" in each of several earlier *NYPD Blue* episodes was indecent—even though "the expletives may have made some contribution to the authentic feel of the program"—because "we believe that purpose could have been fulfilled and all viewpoints expressed without the ... expletives." *Id.* at 2698 (¶134).

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[8] The Commission later dismissed, on procedural grounds, the indecency complaints filed regarding these *NYPD Blue* broadcasts. Pet. App. 10a & n.5

The Commission's use of such artistic judgments in making indecency determinations is thoroughly antithetical to the First Amendment. As this Court has explained, "judgments about art ... are for the individual to make, not for the Government to decree." *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). Hence, "the Commission may not impose upon [broadcasters] its private notions of what the public ought to hear." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994). The use of artistic judgments also contributes to the fatal vagueness problem, as broadcasters cannot possibly predict which allegedly-indecent material three commissioners will (sometimes years later) deem artistically "essential" or "integral" to a particular broadcast, and hence not indecent. *See* Pet. App. 29a ("[I]t is hard not to speculate that the FCC was simply more comfortable with the themes in 'Saving Private Ryan.'").

In short, the Commission's current approach to indecency enforcement appears driven by its own regard for the merits of the particular broadcast at issue, and in each case the Commission reaches its desired result by adjusting, without adequate explanation, the weight it gives to the three patent-offensiveness factors, while also heavily weighting or instead ignoring other, often undefined "contextual considerations." *See* Pet. App. 24a ("[T]he Commission's reasoning [frequently] consisted of repetition of one or more of the factors without any discussion of how it applied them."). In the end, broadcasters know only that material will be deemed "indecent" when at least three commissioners find it "patently offensive." This is a textbook example of unconstitutional vagueness, and the court of appeals correctly struck it down. *See Gooding* v. *Wilson*, 405 U.S. 518, 528 (1972).

c. The Second Circuit's conclusion regarding vagueness is confirmed by the clear chilling effect—discussed at some length by the court yet ignored by petitioners—that the Commission's policy has on broadcasters' constitutionally protected expression. *See* Pet. App. 31a-34a. That effect is magnified by the Commission's use of its draconian forfeiture authority. Under 47 U.S.C. §503(b)(2)(C)(ii), the Commission may now impose a fine of up to $325,000 for each violation of §1464. As part of its more-aggressive approach to indecency enforcement, the Commission, which previously deemed this to be a per-broadcast limit, has reinterpreted it as a *per-station* limit. *See* Pet. App. 8a. Because network programs are frequently aired by scores of stations, forfeitures for a single broadcast could easily run into the tens of millions of dollars. *Id.* These circumstances inevitably cause broadcasters to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (internal quotation marks omitted).

In its order in *Fox*, the Commission responded to this concern by promising that it would "follow a restrained enforcement policy in imposing forfeitures in this area." Pet. App. 86a n.167 (¶53). But then in *ABC* the Commission imposed the then-maximum forfeiture (one-tenth of the current maximum) despite the brevity of the nudity; the lack of any sexual or excretory activity in the scene, and of any display of sexual interest by either character; ABC's use of a prominent viewer advisory and of a V-chip rating that enabled parents and others to block the program from their television sets; and the fact that the scene was part of a serious, non-sexual storyline in a long-running, highly acclaimed, award-winning program. The only one of these mitigat-

ing factors the Commission even mentioned in the forfeiture order was the advisory, which it brushed aside without explanation. *See* Pet. App. 183a (¶52).

Further, as justification for imposing the maximum sanction, the Commission pointed, with one exception, to nothing more than the very factors that make up the patent-offensiveness test, *i.e.*, that the scene was supposedly "graphic and shocking" and "shocking and titillating." Pet. App. 183a (¶52). The one exception was the fact that the show was pre-recorded. *See id.* Under this reasoning, the maximum forfeiture would be appropriate for *every* pre-recorded show the Commission deemed to satisfy its indecency standard. That approach cannot possibly be labeled "restrained." Pet. App. 86a n.167 (¶53). Indeed, it simply underscores the serious chilling effect of the Commission's vague (and quite unrestrained) indecency-enforcement policy. *See NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

2. Petitioners' Arguments Regarding The Second Circuit's Vagueness Ruling Lack Merit

a. In attacking the Second Circuit's vagueness analysis, petitioners do not assert (with one exception, discussed *infra* pp.18-21) that the court misstated the basic framework of vagueness doctrine. For good reason: The court's discussion of vagueness law was entirely in accord with this Court's precedent (which the court of appeals repeatedly cited), including the point that although perfect clarity is not required, government restrictions on free speech are subject to "a more stringent vagueness test," *Hoffman Estates*, 455 U.S. at 499. Indeed, the Second Circuit's explication of vagueness doctrine is virtually identical to the one petitioners offer here. *Compare* Pet. 25, *with* Pet. App. 18a-19a.

Petitioners instead argue that the court of appeals erred because the existence of "close cases" does not render a statute or agency policy unconstitutionally vague. Pet. 28. That response is misdirected. The Second Circuit's vagueness ruling does not rest on the Commission's treatment of "close cases." Rather, it rests on the Commission's inconsistent and often contradictory treatment of cases, and the fact that these inconsistent rulings mean "broadcasters have no way of knowing what the FCC will find" indecent. Pet. App. 34a. The court, in other words, did not fault the Commission for its treatment of cases close to the indecency line, but rather for its treatment of cases close (sometimes extremely close) to each other. On that point, petitioners have notably little to say.

Petitioners do cite (Pet. 28 n.3) this Court's observation in *Fox* regarding *Saving Private Ryan*, a case the Second Circuit repeatedly invoked in discussing the Commission's inconsistencies. All this Court said, however, was that the Commission could reasonably conclude that the adult themes of *Saving Private Ryan* made it unlikely that children would be watching. *See FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1814 (2009). That is consistent with the discussion of context in *Pacifica*, where the Court explained that a program's content, like the time of day of the broadcast, might affect "the composition of the audience." 438 U.S. at 750. The statement in *Fox* does not, however, speak to the inconsistencies noted above (and by the Second Circuit), including as to the disparate treatment of *Saving Private Ryan* and *The Blues*, neither of which targeted younger viewers. *See supra* pp.11-14; Pet. App. 26a-27a. Nor does it distinguish *Saving Private Ryan* from *NYPD Blue*, which just as clearly was not presented as appropriate for "the most vulnerable,"

Fox, 129 S. Ct. at 1814, and which likewise included both a rating and an advisory that "would put parents on notice of potentially objectionable material," *id.*; *see supra* p.5 (discussing advisory).

Petitioners also imply that the court of appeals erred in even considering the Commission's application of the indecency standard in other cases, because "the language of the rule ... determines whether a law or regulation is impermissibly vague." Pet. 27. But even if the patent-offensiveness factors alone rendered the otherwise-vague indecency standard facially clear (a point ABC certainly does not concede), petitioners offer neither logic nor authority to support the notion that the Constitution allows the government to promulgate a clear speech restriction and then apply it in a manifestly inconsistent way. That approach, no less than a facially vague restriction, impermissibly leaves the public unable to ascertain what speech is prohibited and thus chills constitutionally protected expression.

Moreover, petitioners are in no position to criticize the court of appeals for examining other indecency decisions. *See* Pet. 18, 23, 27-28. Petitioners themselves invoked these decisions below in an effort to escape the force of *Reno*, arguing that they provided additional (and adequate) guidance to broadcasters regarding what is indecent. *See* Pet. App. 23a. Indeed, petitioners do precisely the same here. *See* Pet. 26. The Second Circuit did not err in addressing that argument.

b. Petitioners also complain (Pet. 22-25) that the court of appeals erroneously failed to apply *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010), in that the court did not address whether the Commission's policy is unconstitutionally vague as applied to the facts of these specific cases. That argument is without merit.

To begin with, *Holder* rested in significant part on the fact that the challenged statute implicated national-security concerns. "Congress and the Executive," the Court stated, "are uniquely positioned to make principled distinctions" in that area. 130 S. Ct. at 2728. This was different, the Court elaborated, from cases like *Cohen* v. *California*, 403 U.S. 15 (1971), in which "the application of the statute turned on the offensiveness of the speech at issue," *Holder*, 130 S. Ct. at 2728. That, of course, is precisely the context here. And in that context, the Court reiterated, "'governmental officials *cannot* make principled distinctions.'" *Id.* (emphasis added) (quoting *Cohen*, 403 U.S. at 25). *Holder* thus reaffirmed the Court's longstanding view that the First Amendment normally does not tolerate government choices about what speech can be punished as subjectively offensive.

In any event, applying *Holder* as petitioners now urge would not change the outcome here. Indeed, petitioners do not even argue otherwise. *See* Pet. 23-24. That is undoubtedly because ABC had no notice that a seven-second, non-sexual display of adult buttocks, in the context of a serious storyline by an acclaimed series, could be deemed indecent. The text of the Commission's patent-offensiveness factors gave no such notice. The wholly non-sexual nature of the scene—a woman preparing for the quotidian activity of her morning shower before work, followed by a momentary and highly embarrassing encounter with a child—demonstrates that the scene did not "pander[,] ... titillate, or ... shock." *Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. §1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8003 (¶10) (2001) (emphasis omitted). And the nudity's brevity shows that it was not "dwell[ed] on or repeat[ed] at length."

Id. (emphasis omitted). In fact, the scene did not even satisfy the Commission's threshold indecency requirement, because it did not depict "sexual or excretory organs or activities." *Id.* at 8002 (¶7). By any definition that ABC had notice of when the episode aired in 2003, buttocks are not an organ.

Nor did Commission precedent give ABC any reason to think the scene could be declared indecent. The Commission had previously stated that even "full frontal nudity is not *per se* indecent." *Industry Guidance*, 16 F.C.C.R. at 8012 (¶21). It had also rejected indecency complaints involving much longer displays of nudity, including full frontal nudity (and, in unpublished decisions, sexualized nudity). *See WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1841 (¶11) (2000); Letter from David Molina, *supra* p.11 (rejecting complaint regarding broadcast that involved extended, sometimes sexualized, frontal and rear nudity). Furthermore, Commission decisions finding depictions or descriptions of sexual or excretory organs indecent have emphasized that the material was "shocking, pandering, or titillating" because it was used in a sexualized or excretory fashion. *See Citadel Broad. Co.*, 16 F.C.C.R. 11839, 11840 (¶6) (2001) ("lyrics contain[ing] sexual references in conjunction with sexual expletives ... appear intended to pander and shock"); *Industry Guidance*, 16 F.C.C.R. at 8010 (¶20) (citing *Rusk Corp. Radio Station KLOL(FM)*, 5 F.C.C.R. 6332 (1990), as deeming patently offensive an "[e]xplicit description ... that focused on sexual activities in a lewd, vulgar, pandering and titillating manner"); *see also Omnibus Order*, 21 F.C.C.R. at 2703 (¶162).

In contrast, the Commission has repeatedly deemed not indecent references to sexual or excretory organs or activities that were not "eroticized,"

Omnibus Order, 21 F.C.C.R. at 2703 (¶162), or distinctly excretory. For example, the Commission concluded that a scene of *Will & Grace* showing a man and woman touching and adjusting another woman's clothed breasts as she prepared for a date was not shocking, pandering, or titillating because "the touching of the breasts is not portrayed in a sexualized manner." *Id.* at 2702 (¶158). Similarly, the Commission explained that the depiction of a baby's buttocks on *America's Funniest Home Videos* was not shocking, pandering, or titillating because it was "not sexualized in any manner." *Id.* at 2719 (¶226); *see also id.* at 2706 (¶¶175-176, 178) ("highly graphic and explicit" descriptions of "sexual practices," which "continue[d] at length" on an episode Oprah Winfrey, not patently offensive because done "to inform viewers," not in a "vulgar" way). Indeed, the forfeiture order cites no Commission precedent deeming material remotely like the scene at issue here to be indecent. *Holder* does not help petitioners.[9]

c. Petitioners also assert that any vagueness concerns are ameliorated because the Commission has "de-

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[9] Petitioners are in any event poorly situated to complain about any aspect of the *ABC* panel's ruling, including its non-application of *Holder*. Following the Second Circuit's decision in *Fox*, the *ABC* panel directed the parties to file supplemental briefs addressing *Fox*'s impact on *ABC*. Petitioners' supplemental brief offered no criticism of the *Fox* decision, including for declining to apply *Holder*. Nor did petitioners argue that *Holder* required the *ABC* panel to uphold the Commission's forfeiture order. Instead, though stating that *Fox* and *ABC* involved "very different facts," Supp. Br. 3, petitioners asserted that the decision in *Fox* dictated the invalidation of the *ABC* forfeiture order, *see id.* Petitioners asked only that the *ABC* panel withhold any decision until after the disposition of any rehearing petition in *Fox*. *See id.* at 4. The panel did exactly that.

clin[ed] to sanction broadcasters in cases (such as *Fox*) where it was not clear at the time of the broadcast that the FCC regarded the pertinent material as indecent." Pet. 27. That argument fails.

The Commission did not impose monetary penalties in *Fox* because the indecency finding there rested on an acknowledged policy change, namely that even a single expletive used as an intensifier can be indecent. *See* Pet. App. 93a (¶60), 95a & n.199 (¶64). Most indecency cases, however, do not involve an avowed policy shift by the Commission. They instead involve, as the Second Circuit explained, inconsistent applications of the FCC's generic indecency standard—inconsistencies the Commission does not acknowledge and hence do not lead it to refrain from imposing fines. *ABC* itself is an example of this: As explained, the Commission had never before deemed material like the *NYPD Blue* scene here to be indecent, and in fact had found much longer and sexualized displays of nudity not indecent. Yet the Commission did not acknowledge any policy change in deeming the *NYPD Blue* scene indecent, and certainly did not decline to impose a forfeiture. To the contrary, it imposed the *maximum* penalty then authorized, resulting in a fine of well over $1 million. The Commission's decision not to impose a penalty in *Fox* does nothing to ameliorate the fatal vagueness with the Commission's indecency policy.

B. The Second Circuit's Decisions Do Not Conflict With *Pacifica* Or The D.C. Circuit's *ACT* Cases

Petitioners contend that the Second Circuit's decisions here conflict with *Pacifica* and with the D.C. Circuit's *ACT* cases. That is incorrect.

1. Petitioners' attempt to depict a conflict with *Pacifica* rests on a mischaracterization of the Second Circuit's decisions. The court's vagueness ruling was not driven by the Commission's use of a contextual approach in making indecency determinations. *See* Pet. 13-14, 17, 20. In fact, the court expressly stated in *Fox* that "[o]f course, context is always relevant, and we do not mean to suggest otherwise." Pet. App. 30a. What the court quite rightly faulted the Commission for was turning the notion of "context" into a smokescreen, an empty mantra that the Commission invokes in case after case to justify starkly inconsistent decisions. *See id.* ("It does not follow that the FCC can justify any decision to sanction indecent speech [merely] by citing 'context.'"). That analysis in no way conflicts with *Pacifica*, which of course long pre-dates those inconsistent decisions.

To the extent petitioners are arguing that *Pacifica* forecloses any vagueness challenge to the Commission's indecency regime (*e.g.*, Pet. 19-20), that argument lacks merit. No vagueness claim was advanced in *Pacifica*; the broadcaster argued instead that "indecency" necessarily entailed prurient appeal. *See* 438 U.S. at 739. And as discussed, *Pacifica* held only that the Commission is not without *any* authority to proscribe indecent but not obscene broadcasts. *See supra* pp.2-3.[10]

2. Equally meritless is petitioners' claim of a conflict between the decisions below and the *ACT* cases. In

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[10] Petitioners quote dictum from this Court's decision in *Fox* regarding the reach of *Pacifica*. *See* 129 S. Ct. at 1815, *quoted in* Pet. 20. That dictum—which in any event concerned administrative rather than constitutional law—does not alter the "emphatically narrow holding" in *Pacifica* with which petitioners posit a conflict, *Sable Commc'ns*, 492 U.S. at 127.

1988, the D.C. Circuit rejected a facial vagueness challenge to the text of the Commission's indecency standard, *i.e.*, "[t]he generic definition of indecency." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (*ACT I*). Subsequently, another D.C. Circuit panel, and then the en banc court, rejected the same vagueness challenge, each time on the strength of its prior case law. *See Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT I* precludes us from now finding the Commission's generic definition of indecency to be unconstitutionally vague."); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc) (*ACT III*) (similar).

Those cases do not conflict with the decisions below because the Second Circuit did not hold the "generic definition" of indecency to be vague. As explained, it instead held that the Commission's inconsistent and contradictory *application* of that standard—since the *ACT* decisions—has impermissibly left broadcasters with no way to know what material the Commission will deem indecent in the future. Petitioners respond to this point with the bald assertion that the Commission's decisions cannot justify a departure from the *ACT* cases because those decisions have "clarified the manner in which the Commission will apply its" indecency standard. Pet. 22. For the reasons given above (and by the Second Circuit), that assertion is manifestly incorrect. The Commission's decisions have left its indecency policy vague in a way and to an extent that did not remotely exist at the time of the *ACT* decisions. The Second Circuit's recognition of that fact does not conflict with those decisions—which also predate this Court's decision in *Reno*.

Petitioners suggest, however (Pet. 22), that the court of appeals in *Fox* acknowledged a conflict with the *ACT* decisions. It did not. The court stated that it dis-

agreed with those decisions "to the extent" they held all vagueness challenges foreclosed by *Pacifica*. Pet. App. 22a n.8. It offered this observation in answer to petitioners' contention that the *ACT* cases "preclude [respondents'] vagueness challenge." *Id.* As just explained, that contention is wrong; the *ACT* decisions do not bar all vagueness challenges, and hence do not conflict with the Second Circuit's vagueness holdings.

Even if there were a conflict, review would not be warranted here. The proper course would be to give the D.C. Circuit an opportunity to eliminate the shallow, 1-1, conflict by reconsidering its decades-old *ACT* decisions in light of *Reno*, the decisions below, and the Commission's abandonment of restrained indecency enforcement. Indeed, a vehicle for such reconsideration is already pending in the District Court for the District of Columbia. *See United States* v. *Fox Television Stations, Inc.*, No. 08-cv-584 (D.D.C.).

C. The Second Circuit's Judgment Is Correct Independent Of Its Vagueness Analysis

Petitioners' questions presented (Pet. I) are limited to whether the Second Circuit's vagueness holding is correct. While the answer is yes, the court's *judgment* was correct—and could be affirmed—on other, independent constitutional grounds that ABC advanced in the court of appeals. *See, e.g., Yeager* v. *United States*, 129 S. Ct. 2360, 2370 (2009) (prevailing party may defend the judgment on any ground properly raised below). That being the case, this Court would not even need to reach the Second Circuit's vagueness ruling in order to affirm. These cases are thus a poor vehicle for addressing the vagueness question petitioners present.

1. The Second Circuit's judgment is correct because there exists an effective, far less restrictive, and broadly available way to support parents' efforts to control what their children watch on television—the only government interest advanced by the Commission as justifying broadcast-indecency regulation, *see ACT I*, 852 F.2d at 1343-1344 & n.20. Specifically, the V-chip allows viewers to block television programs based on their rating, which specifies both a program's overall age-appropriateness, from "TV-Y" for children's shows to "TV-MA" for adult programming, and its particular content, such as "intense violence (V)" or "strong coarse language (L)." FCC V-Chip, *supra* n.4. Both Congress and the Commission have found the V-chip effective at preventing children from unapproved viewing of mature programming. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, §551(a)(9), 110 Stat. 56, 140; *Implementation of Section 551 of the Telecomm. Act of 1996*, 13 F.C.C.R. 8232, 8243 (¶24) (1998). And with the 2009 switch to all-digital transmission of television signals, virtually every functioning television in America has a V-chip or equivalent blocking technology. *See, e.g., Implementation of the Child Safe Viewing Act*, 24 F.C.C.R. 11413, 11418-11419 & n.20 (¶11) (2009) (hereafter *CSVA*).

This Court has repeatedly struck down content-based speech restrictions where a less restrictive alternative was (or even might have been) available. *See Ashcroft* v. *ACLU*, 542 U.S. 656, 667 (2004); *Playboy*, 529 U.S. at 815; *Reno*, 521 U.S. at 877-879; *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 756, 758 (1996); *Sable Commc'ns*, 492 U.S. at 128-131. In one such case, the Court explained simply that "if a less restrictive means is available for the Government to achieve its goals, the Government *must* use it." *Playboy*, 529 U.S. at 815 (emphasis added). Contrary to

the Commission's view, moreover, *see* Pet. App. 177a & n.136 (¶47), this principle applies even if (unlike here) a less-restrictive technology is untested or not widely available, *see Reno*, 521 U.S. at 877; *Sable Commc'ns*, 492 U.S. at 128-131, or if many people are unaware of it or do not know how to use it, *see Playboy*, 529 U.S. at 816; *Denver Area*, 518 U.S. at 758-759.

The fact that these cases did not involve broadcasting, which under *Pacifica* receives reduced First Amendment protection, is immaterial. This Court has made clear that restrictions on broadcasters' expression must be narrowly tailored. *See, e.g.*, *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984). That requirement is not met here. The V-chip—whose effectiveness and availability are much greater than the technology in many of the cases just discussed—would restrict far less expression, while substantially accomplishing the government's goal of assisting parents in controlling what their children watch on television. Because "targeted blocking is a feasible and effective means of furthering its compelling interests," the government "cannot ban speech." *Playboy*, 529 U.S. at 815.

2. Independent of blocking technology, the Second Circuit's judgment in *ABC* is correct because even under *Pacifica*, the First Amendment simply does not allow the government to proscribe a seven-second nonsexual display of a woman's buttocks like the one at issue here.

Speech may constitutionally be regulated as indecent only if it genuinely has the capacity to threaten the "physical and psychological well-being of minors." *Sable Commc'ns*, 492 U.S. at 126. This Court has found that test met in very limited circumstances, and only where the material was highly sexualized. For example, the

Court has allowed regulation of the sale of pornographic magazines that are harmful to minors. *See Ginsberg* v. *New York*, 390 U.S. 629, 631-633 (1968). But it struck down an ordinance that banned films containing nudity from outdoor theaters—rejecting a protection-of-children rationale—partly because "[t]he ordinance is not directed at sexually explicit nudity." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 (1975).

A second factor the Court has considered in deciding whether particular indecent material may be regulated is the material's duration, *i.e.*, how long children would be exposed to it. In *Erznoznik*, for example, a second reason the Court gave for striking down the ordinance was that it "sweepingly forbids ... films containing any uncovered buttocks ..., irrespective of ... pervasiveness." 422 U.S. at 213. Similarly, in *Playboy* the Court struck down a statute regulating (highly sexual) cable-television programs after noting that the law reached material "as fleeting as an image appearing on a screen for just a few seconds." 529 U.S. at 819. And in *Pacifica* itself, the concurrence emphasized that the monologue's expletives—which were infused with sexuality—were "repeated over and over." 438 U.S. at 757 (Powell, J., concurring in part and concurring in the judgment). The concurrence also suggested that this factor was all but dispositive, stating that "certainly the Court's holding today[] does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-761. Indeed, the Commission took the same position; its briefing stressed that "its ruling carried with it the limiting condition[] of certain words repeated over and over." *ACT I*, 852 F.2d at 1337 (citing the Commission's *Pacifica* brief).

These decisions make clear that the *NYPD Blue* scene here cannot constitutionally be punished as inde-

cent. The nudity lasted only seven seconds (less than one percent of the length of the Carlin monologue), and was entirely non-sexual. Precedent aside, moreover, there is no serious argument—certainly the Commission has offered none—that viewing the scene could harm children. To be sure, the Court in *Pacifica* suggested that hearing the Carlin monologue could "enlarge[] a child's vocabulary in an instant." 438 U.S. at 749. But even if that is true, there is no analogous consequence here. Every child has seen buttocks (presumably for longer than seven seconds), and children could learn nothing about sex or excretion from the scene because it contains nothing on those topics. Particularly given the Commission's stark inability to articulate the harm to children from viewing this scene, the First Amendment does not allow its proscription. *See Denver Area*, 518 U.S. at 766 (plurality opinion) ("[Absent] a factual basis substantiating the harm[,] ... we cannot assume that the harm exists." (citing *Turner Broad.*, 512 U.S. at 664-665)).

3. Finally, the Second Circuit's judgment is correct because *Pacifica*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), and other cases approving reduced First Amendment scrutiny for content-based restrictions on broadcasters' expression are not viable today. *See Fox*, 129 S. Ct. at 1819-1822 (Thomas, J. concurring); *ACT III*, 58 F.3d at 672-677 (Edwards, C.J., dissenting).

Pacifica asserted that broadcasting is "uniquely pervasive" and "uniquely accessible to children." 438 U.S. at 748, 749. This justification was questionable even in 1978. *See Fox*, 129 S. Ct. at 1820 (Thomas, J. concurring). But whatever was true 33 years ago, broadcast television is now neither uniquely pervasive nor uniquely accessible to children. Almost 90 percent of American households currently subscribe to cable or

satellite television services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, 546 (¶8) (2009). These bring dozen (often hundreds) of non-broadcast television channels into people's homes to the same extent—and with the same accessibility to children—as broadcast television. *See, e.g.*, *Denver Area*, 518 U.S. at 744-745 (plurality opinion). Similarly, "[t]he internet ... has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs." Pet. App. 15a (citing *CSVA*, 24 F.C.C.R. at 11468 (¶126)).[11]

Similarly, developments since *Red Lion* have rendered the predicate for that decision untenable today. In *Red Lion* the Court upheld an FCC requirement "that discussion of public issues be presented on broadcast stations, and that each side of those issues ... be given fair coverage." 395 U.S. at 369. The Court's decision rested on "the scarcity of broadcast frequencies." *Id.* at 400; *see also NBC, Inc.* v. *United States*, 319 U.S. 190, 226 (1943). Over six years ago, however, a detailed analysis by the Commission's own staff explained that in light of the recent explosion of cable, Internet, and

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[11] Petitioners quote (Pet. 11-12) this Court's statement in *Fox* that the spread of other media could justify the Commission's decision to regulate broadcasters more strictly "so as to give conscientious parents a relatively safe haven for their children." 129 S. Ct. at 1819. That comment, however, was made in a discussion of administrative law. It is not reasoning this Court has ever embraced as a matter of First Amendment law, and indeed the First Amendment cannot possibly countenance the government singling out one group of speakers and restricting that group's speech because of the content or quantity of others' expression. *Cf. Citizens United* v. *FEC*, 130 S. Ct. 876, 898-899 (2010).

other media outlets, "[b]y no rational, objective standard can it still be said that, today in the United States, channels for broadcasting are scarce." Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting* 18 (Mar. 2005).[12] This observation holds true even looking only at over-the-air broadcast channels. The absolute number of such channels has more than doubled since *Red Lion* was decided, *see id.* at 12-13, while the recent switch from analog to digital television signals allows four times as many programs to be broadcast simultaneously over each channel, *Consumer Elecs. Ass'n* v. *FCC*, 347 F.3d 291, 293 (D.C. Cir. 2003) (Roberts, J.), *cited in Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring). In 1984 this Court indicated a willingness to reconsider the scarcity rationale upon receiving "some signal from ... the FCC that technological developments" make such reconsideration appropriate. *League of Women Voters*, 468 U.S. at 377 n.11. Since then, the Commission, in addition to issuing the staff report cited above, has stated that "we no longer believe that there is scarcity in the number of broadcast outlets available to the public." *Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, N.Y.*, 2 F.C.C.R. 5043, 5054 (¶74) (1987) (subsequent history omitted), *abrogated on other grounds, Repeal or Modification of the Personal Attack & Political Editorial Rules*, 15 F.C.C.R. 19973, 19979-19980 (¶¶16-18) (2000). That statement was correct.

Put simply, then, "[t]he extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today."

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[12] *Available at* http://www.fcc.gov/ownership/materials/already-released/scarcity030005.pdf.

Fox, 129 S. Ct. at 1822 (Thomas, J., concurring). Content-based restrictions on broadcasters' expression are thus properly subject to strict scrutiny. The indecency findings here could not possibly survive such scrutiny.

D. Petitioners Greatly Overstate The Consequences Of The Second Circuit's Ruling

Petitioners portray the implications of the Second Circuit's decisions in apocalyptic terms, declaring that the court of appeals has "preclude[d] the FCC from carrying out its statutory responsibility to" prohibit the "air[ing of] indecent material." Pet 18; *accord* Pet. 30. That too is wrong.

The heart of petitioners' consequences argument is the fact that the court of appeals "identified no alternative definition of actionable indecency that would provide the requisite clarity without creating countervailing practical and constitutional difficulties." Pet. 30; *see also* Pet. 21. But the court has no obligation to do the Commission's job for it. Furthermore, petitioners' complaint about the "practical ... difficulties" of alternate approaches (Pet. 30) is plainly insubstantial. Free speech and due process rights may not be trampled anytime alternate approaches would create "practical ... difficulties" for the government.

In any event, all that the Second Circuit deemed impermissible was the Commission's inconsistent and contradictory applications of its indecency standard in recent years. The court correctly concluded that this approach "hardly gives broadcasters notice of how the Commission will apply the factors in the future." Pet. App. 24a. That conclusion does not bar the Commission from attempting to articulate and apply, in a consistent and restrained fashion, a set of rules and policies that

not only provide broadcasters with clear guidance but also comport with First Amendment requirements regarding the availability of less restrictive alternatives and broad deference to broadcasters' editorial and artistic decisions.[13] Notably, in the ten months since *Fox* was decided, the Commission has not initiated any public rulemaking or other inquiry into this area. Petitioners' claim of dire consequences thus deserves no weight.[14]

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[13] In a fleeting parenthetical—supported by no authority—petitioners assert that the Commission currently gives weight to broadcasters' reasonable artistic judgments when deciding whether to impose sanctions. *See* Pet. 22. In recent years, however, the Commission has repeatedly stated that material it considers otherwise indecent may be deemed not indecent "where it is demonstrably essential to the nature of an artistic or educational work." *E.g.*, *Omnibus Order*, 21 F.C.C.R. at 2686 (¶82). A standard that exempts from sanction only material that licensees can demonstrate to be artistically "essential" is a far cry from deference to a licensee's "reasonable" judgment and imposes a severe burden on the exercise of First Amendment rights.

[14] Petitioners assert in passing that in light of the Second Circuit's decisions, "broadcasters may well believe that they have been freed of the ... obligation not to air indecent programming." Pet. 29. Yet petitioners offer nothing to support this assertion, *i.e.*, nothing indicating that the airwaves have been flooded with indecent material in the ten months since *Fox* was decided. The absence of any such flood is just the latest piece of evidence belying the Commission's long-held, but quite mistaken, view of broadcasters as willing if not eager to air whatever the law permits, and its concomitant—and equally mistaken—view of itself as the only bulwark against the overrunning of the airwaves with indecent programming. (Another piece of evidence is the absence of any flood of indecent material during the "safe harbor" between 10 pm and 6 am local time, when such material has long been permissible. *See* 47 C.F.R. §73.3999(b).)

II. If Certiorari Is Granted, The Question Presented Should Encompass All Available Grounds For Affirmance

As discussed, petitioners' question presented is unduly narrow, focusing exclusively on the issue of vagueness rather than addressing more generally whether the Commission's current indecency policy violates the First or Fifth Amendment (or both). If the Court does grant review, it should do so on the question presented herein, because as noted the Court may affirm the judgments (and respondents can and will defend them) on any grounds raised below. Adopting ABC's question presented would ensure that the Court will receive adequate briefing from both sides on all relevant grounds, including those discussed above, *see* Part I.C.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN W. ZUCKER
ABC, INC.
77 West 66th Street
New York, N.Y. 10023
(212) 456-7387

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL S. VOLCHOK
MICAH S. MYERS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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OPPOSITION BRIEF

No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Petitioners,

v.

FOX TELEVISION STATIONS, INC. ET AL.,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Petitioners,

v.

ABC, INC. ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ABC TELEVISION AFFILIATES ASSOCIATION ET AL.

Wade H. Hargrove
Counsel of Record
Mark J. Prak
David Kushner
Julia C. Ambrose
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
150 Fayetteville Street
Suite 1600
Raleigh, N.C. 27601
919.839.0300
whargrove@brookspierce.com

May 23, 2011

[Additional Respondents Listed on Inside Cover]

THE LEX GROUP DC • 1825 K Street, N.W. • Suite 403 • Washington, D.C. 20006
(202) 955-0001 • (800) 856-4419 • Fax: (202) 955-0022 • www.thelexgroup.com

Additional Respondents Joining in Brief in Opposition

Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television, Inc., WSIL-TV, Inc., Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont, Inc., Duhamel Broadcasting Enterprises, Gray Television Licensee, Inc., KATC Communications, Inc., KATV, LLC, KDNL Licensee, LLC, KETV Hearst-Argyle Television, Inc., KLTV/KTRE License Subsidiary, LLC, KSTP-TV, LLC, KSWO Television Company, Inc., KTBS, Inc., KTUL, LLC, KVUE Television, Inc., McGraw-Hill Broadcasting Company, Inc., Media General Communications Holdings, LLC, Mission Broadcasting, Inc., Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting, Inc., NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television, Inc., Piedmont Television of Huntsville License, LLC, Piedmont Television of Springfield License, LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations, San Antonio, Inc., Scripps Howard Broadcasting Co., Southern Broadcasting, Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans, Inc., WAPT Hearst-Argyle Television, Inc., WDIO-TV, LLC, WEAR Licensee, LLC, WFAA-TV, Inc., WISN Hearst-Argyle Television, Inc.

Question Presented

In February 2008, the Federal Communications Commission imposed indecency fines totaling more than $1.2 million for the February 2003 television broadcast of a single episode of the long-running, award-winning adult police drama *NYPD Blue*. The challenged episode, which aired in the last hour of prime time, included fewer than seven seconds of non-sexualized nudity in the form of an actress's buttocks. The Commission deemed the brief nudity "indecent" under its revised indecency standard.

The Petition seeks this Court's review of the decisions of the United States Court of Appeals for the Second Circuit that the FCC's revised indecency standard is unconstitutionally vague in its entirety. As it concerns the indecency finding related to *NYPD Blue*, the Court should consider instead the following question if the Petition is granted:

> Whether the FCC's determination that the brief, non-sexualized depiction of adult buttocks in the February 25, 2003, episode of *NYPD Blue* was actionably indecent is consistent with the limitations of the Due Process Clause and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Corporate Disclosure Statement

Pursuant to Sup. Ct. R. 29.6, Respondents make the following disclosures*:

ABC Television Affiliates Association is a non-profit trade association of approximately 160 television stations affiliated with the ABC Television Network and represents its member stations before the FCC, Congress, and the courts. ABC Television Affiliates Association has issued no shares of stock or debt securities to the public and has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Cedar Rapids Television Company, licensee of Television Station KCRG-TV, Cedar Rapids, Iowa, is a direct, wholly-owned subsidiary of The Gazette Company. The Gazette Company, which is a privately-held corporation, has no parent company, and no publicly-held company owns more than 10% of its stock.

Centex Television Limited Partnership, licensee of Television Station KXXV(TV), Waco, Texas, is a limited partnership whose partners are KSWO Television of Texas, Inc. (which is wholly owned by KSWO Television Co., Inc.) and Lawton Cablevision, Inc., and no publicly-held company owns shares in any of the partners.

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* Respondents' names in bold are the names of the parties as they originally appeared below. Many Respondents have since undergone corporate restructurings. All relevant entities are included in these disclosures.

Channel 12 of Beaumont, Inc., former licensee of Television Station KBMT(TV), Beaumont, Texas, has been dissolved. Channel 12 of Beaumont, Inc.'s sole shareholder was Texas Telecasting, Inc., which remains in existence and is a 100% subsidiary of Texas Television, Inc., which is a privately-held corporation, and no stockholder is a publicly-held company.

Citadel Communications, LLC, licensee of Television Station KLKN(TV), Lincoln, Nebraska, is a privately-held limited liability company. No member of Citadel Communications, LLC, is a corporation. Citadel Communications Company, Ltd., which is also a limited liability company, is the only member of Citadel Communications, LLC that is not a natural person, and only one interest holder in Citadel Communications Company, Ltd.—C.C.C. Communications Corporation—is a corporation, and no stockholder of that corporation is a publicly-held company.

Duhamel Broadcasting Enterprises ("DBE"), licensee of Television Station KOTA-TV, Rapid City, South Dakota, is a privately-owned corporation, and no stockholder of DBE is a publicly-held company.

Gray Television Licensee, LLC (f/k/a **Gray Television Licensee, Inc.**), licensee of Television Station KAKE-TV, Wichita, Kansas, and licensee of Television Station KLBY(TV), Colby, Kansas, is a subsidiary of Gray Television Group, Inc., which is, in turn, a subsidiary of WVLT-TV, Inc. The corporate parent of WVLT-TV, Inc. is Gray Television, Inc., a publicly-held company traded on the New York Stock Exchange.

KATC Communications, Inc., licensee of Television Station KATC(TV), Lafayette, Louisiana, is a wholly-owned subsidiary of Cordillera Communications, Inc. Cordillera Communications, Inc. is, in turn, a wholly-owned subsidiary of Evening Post Publishing Company ("Evening Post"). Evening Post is a privately-held company. No publicly-held company has a 10% or greater direct or indirect ownership interest in Evening Post or in KATC Communications, Inc.

KATV, LLC, licensee of Television Station KATV(TV), Little Rock, Arkansas, is a wholly-owned subsidiary of Allbritton Communications Company, which is, in turn, wholly owned by Allbritton Group, Inc., which is wholly owned by Perpetual Corporation. All of the shares of Perpetual Corporation are indirectly owned by or for the benefit of Joe L. Allbritton, Barbara B. Allbritton, and Robert L. Allbritton.

KDNL Licensee, LLC, licensee of Television Station KDNL-TV, St. Louis, Missouri, is an indirect wholly-owned subsidiary of Sinclair Broadcast Group, Inc., a publicly-held company traded on NASDAQ.

KETV Hearst Television Inc. (f/k/a **KETV Hearst-Argyle Television, Inc.**), licensee of Television Station KETV(TV), Omaha, Nebraska, is a wholly-owned subsidiary of Hearst Properties Inc., which is a wholly-owned subsidiary of Hearst Television Inc. Hearst Television Inc. is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a

privately-held corporation, and no shareholder is a publicly-held company.

KLTV/KTRE License Subsidiary, LLC, licensee of Television Station KLTV(TV), Tyler, Texas, is a wholly-owned subsidiary of KLTV/KTRE LLC, which is a wholly-owned subsidiary of TV-3, LLC, which is a wholly-owned subsidiary of Raycom TV Broadcasting, LLC, which is a wholly-owned subsidiary of Raycom TV Broadcasting, Inc. Raycom TV Broadcasting, Inc. is, in turn, owned by Raycom Media, Inc. and Liberty Corporation. Liberty Corporation is a wholly-owned subsidiary of Raycom Media, Inc. Raycom Media, Inc. is a privately-owned corporation, and no publicly-held company owns more than 10% of its stock.

KSTP-TV, LLC, licensee of Television Station KSTP-TV, St. Paul, Minnesota, is a wholly-owned subsidiary of Hubbard Broadcasting, Inc., which is a privately-owned corporation. No shareholder with 10% or greater interest in Hubbard Broadcasting, Inc. is publicly traded.

KSWO Television Co., Inc., licensee of Television Station KSWO-TV, Lawton, Oklahoma, is a privately-owned corporation, and no shareholder is a publicly-held company.

KTBS, LLC (f/k/a **KTBS, Inc.**), licensee of Television Station KTBS-TV, Shreveport, Louisiana, is a privately-owned limited liability company, and no interest holder is a publicly-held company.

KTUL, LLC, licensee of Television Station KTUL(TV), Tulsa, Oklahoma, is a wholly-owned subsidiary of Allbritton Communications Company,

which is, in turn, wholly owned by Allbritton Group, Inc., which is wholly owned by Perpetual Corporation. All of the shares of Perpetual Corporation are indirectly owned by or for the benefit of Joe L. Allbritton, Barbara B. Allbritton, and Robert L. Allbritton.

KVUE Television, Inc., licensee of Television Station KVUE(TV), Austin, Texas, is a direct, wholly-owned subsidiary of Belo Corp., a publicly-held company traded on the New York Stock Exchange.

McGraw-Hill Broadcasting Company, Inc., licensee of Television Station KMGH-TV, Denver, Colorado, is a wholly-owned subsidiary of The McGraw-Hill Companies, Inc., which is a publicly-held company traded on the New York Stock Exchange. No other publicly-held company has a 10% or greater direct or indirect ownership interest in McGraw-Hill Broadcasting Company, Inc.

Media General Communications Holdings, LLC, former licensee of Television Station WMBB(TV), Panama City, Florida, is a limited liability company the sole member of which is Media General Operations, Inc. Media General Operations, Inc. is a wholly-owned subsidiary of Media General Communications, Inc., which is, in turn, a wholly-owned subsidiary of Media General, Inc. ("Media General"). Media General is an independent, publicly-held company traded on the New York Stock Exchange. It has no parent companies. GAMCO Investors, Inc., a publicly-held company that trades on the New York Stock Exchange, indirectly owns more than 10% of Media General through its wholly-owned subsidiaries GAMCO Asset Management Inc. and

Gabelli Funds, LLC and through its majority-owned subsidiary Gabelli Securities, Inc.

Mission Broadcasting, Inc., licensee of Television Station KODE-TV, Joplin, Missouri, is a privately-owned corporation, and no shareholder is a publicly-held company.

Mississippi Broadcasting Partners, former licensee of Television Station WABG-TV, Greenwood, Mississippi, is a partnership whose 99% partner is Mississippi Telecasting Company, Inc. and whose 1% partner is Bahakel Broadcasting Company. Mississippi Telecasting Company, Inc. is a wholly-owned subsidiary of Greenwood Broadcasting Company, Inc. Greenwood Broadcasting Company, Inc. and Bahakel Broadcasting Company are both wholly-owned subsidiaries of Bahakel Communications, Ltd., which is a privately-held corporation, and no shareholder is a publicly-held company.

New York Times Management Services, former licensee of Television Station WQAD-TV, Moline, Illinois, was, prior to its dissolution, a Massachusetts Business Trust wholly owned by NYT Broadcast Holdings, LLC. The trustee of New York Times Management Services was NYT Group Services, LLC, which is a limited liability company, the sole member of which is The New York Times Company. NYT Broadcast Holdings, LLC is a limited liability company the sole member of which is NYT Holdings, Inc. NYT Holdings, Inc. is a wholly-owned subsidiary of NYT Capital, LLC, which is, in turn, a wholly-owned subsidiary of The New York Times Company. Until 2007, The New York Times Company indirectly owned

nine television stations, including WQAD-TV, which was licensed to New York Times Management Services. The New York Times Company has issued two classes of stock, Class A and Class B. The New York Times Company's Class A stock is publicly traded on the New York Stock Exchange. No publicly-held company has a 10% or greater direct or indirect ownership interest in The New York Times Company.

Nexstar Broadcasting, Inc., licensee of Television Station KQTV(TV), St. Joseph, Missouri, and licensee of Television Station WDHN(TV), Dothan, Alabama, is a wholly-owned subsidiary of Nexstar Finance Holdings, Inc., which is, in turn, a wholly-owned subsidiary of Nexstar Broadcasting Group, Inc. Nexstar Broadcasting Group, Inc. is a publicly-held company traded on the NASDAQ.

NPG of Texas, L.P., licensee of Television Station KVIA-TV, El Paso, Texas, is a wholly-owned subsidiary of NPG Holdings, Inc., which is a wholly-owned subsidiary of News-Press & Gazette Company. No shareholder is a publicly-held company.

Ohio/Oklahoma Hearst Television Inc. (f/k/a **Ohio/Oklahoma Hearst-Argyle Television, Inc.**), licensee of Television Station KOCO-TV, Oklahoma City, Oklahoma, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

Piedmont Television of Huntsville License, LLC, former licensee of Television Station WAAY-TV, Huntsville, Alabama, was, prior to dissolution, a privately-owned limited liability company, and no shareholder was a publicly-held company.

Piedmont Television of Springfield License, LLC, former licensee of Television Station KSPR(TV), Springfield, Missouri, was, prior to dissolution, a privately-owned limited liability company, and no shareholder was a publicly-held company.

Pollack/Belz Communication Company, Inc., licensee of Television Station KLAX-TV, Alexandria, Louisiana, is a privately-owned corporation, and no shareholder is a publicly-held company.

Post-Newsweek Stations, San Antonio, Inc., licensee of Television Station KSAT-TV, San Antonio, Texas, is a wholly-owned subsidiary of Post-Newsweek Stations, Inc., which is a wholly-owned subsidiary of The Washington Post Company, a publicly-held company traded on the New York Stock Exchange.

Scripps Media, Inc., licensee of Television Station KNXV-TV, Phoenix, Arizona, is the successor through merger to **Scripps Howard Broadcasting Co.**, both companies being wholly-owned subsidiaries of The E.W. Scripps Company, a publicly-held company traded on the New York Stock Exchange.

Southern Broadcasting, Inc., licensee of Television Station WKDH(TV), Houston, Mississippi, is a privately-owned corporation, and no shareholder is a publicly-held company.

Tennessee Broadcasting Partners, licensee of Television Station WBBJ-TV, Jackson, Tennessee, is a partnership whose 99% partner is Jackson Telecasters, Inc. and whose 1% partner is Bahakel Broadcasting Company. Jackson Telecasters, Inc. and Bahakel Broadcasting Company are both wholly-owned subsidiaries of Bahakel Communications, Ltd., which is a privately-held corporation, and no shareholder is a publicly-held company.

Tribune Television New Orleans, Inc., licensee of Television Station WGNO(TV), New Orleans, Louisiana, is a wholly-owned subsidiary of Tribune Broadcasting Company, which is a wholly-owned subsidiary of Tribune Company. All three companies are privately held, and no shareholder is publicly held.

WAPT Hearst Television Inc. (f/k/a **WAPT Hearst-Argyle Television, Inc.**), licensee of Television Station WAPT(TV), Jackson, Mississippi, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

WDIO-TV, LLC, licensee of Television Station WDIO-TV, Duluth, Minnesota, is a wholly-owned subsidiary of Hubbard Broadcasting, Inc., which is a privately-owned corporation. No shareholder with 10% or greater interest in Hubbard Broadcasting, Inc. is publicly traded.

WEAR Licensee, LLC, licensee of Television Station WEAR-TV, Pensacola, Florida, is an indirect wholly-owned subsidiary of Sinclair Broadcast Group, Inc., a publicly-held company traded on the NASDAQ.

WFAA-TV, Inc., licensee of Television Station WFAA-TV, Dallas, Texas, is a direct, wholly-owned subsidiary of Belo Corp., a publicly-held company traded on the New York Stock Exchange.

WISN Hearst Television Inc. (f/k/a **WISN Hearst-Argyle Television, Inc.**), licensee of Television Station WISN-TV, Milwaukee, Wisconsin, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

WKOW Television, Inc., licensee of Television Station WKOW-TV, Madison, Wisconsin, is a wholly-owned subsidiary of Quincy Newspapers, Inc. ("QNI"). QNI is a privately-owned corporation, and no shareholder with 10% or greater interest is a publicly-held company.

WKRN, G.P., licensee of Television Station WKRN-TV, Nashville, Tennessee, is a general partnership whose general partners are Young Broadcasting of Nashville LLC ("Young Nashville") and YBT, Inc. ("YBT"). Young Nashville is a wholly-owned subsidiary of Young Broadcasting of Knoxville, Inc., which is a wholly-owned subsidiary of Young

Broadcasting LLC ("YBL"). YBT is also a wholly-owned subsidiary of YBL. The sole member of YBL is New Young Broadcasting Holding Co., Inc. ("New Young"). New Young is a privately-held company and no shareholder with 10% or more interest is publicly traded.

WSIL-TV, Inc., licensee of Television Station WSIL-TV, Harrisburg, Illinois, is a privately-owned corporation, and no shareholder is a publicly-held company.

Young Broadcasting of Green Bay, Inc., licensee of Television Station WBAY-TV, Green Bay, Wisconsin, is a wholly-owned subsidiary of Young Broadcasting LLC, the sole member of which is New Young Broadcasting Holding Co., Inc. ("New Young"). New Young is a privately-held company, and no shareholder with 10% or more interest is publicly traded.

Table of Contents

Question Presented i

Corporate Disclosure Statement ii

Table of Authorities xiv

Introduction 1

Statement of the Case 3

Reasons for Denying the Writ 12

I. No Conflict of Authority Warrants This Court's Review 12

A. There Is No Split of Authority Among the Circuits 13

B. The Decisions Below Do Not Conflict with Decisions of This Court 17

C. Allowing the Second Circuit's Remand to the FCC to Proceed, Rather Than Granting the Petition, Is the Appropriate Course 22

II. If the Court Grants the Petition, It Should Also Consider Whether Settled Constitutional Principles, As Applied to the Facts of This Case, Permit the FCC to Proscribe the *NYPD Blue* Broadcast 25

Conclusion 31

Table of Authorities

Cases

ABC, Inc. v. FCC,
404 Fed. Appx. 530 (2d Cir. 2011) 11, 12

Action for Children's Television v. FCC,
852 F.2d 1332 (D.C. Cir. 1988),
superseded in part by
58 F.3d 654 (D.C. Cir. 1995) 13-16

Action for Children's Television v. FCC,
932 F.2d 1504 (D.C. Cir. 1991),
superseded in part by
58 F.3d 654 (D.C. Cir. 1995) 13-16

Action for Children's Television v. FCC,
58 F.3d 654 (D.C. Cir. 1995) 13-16

Ashwander v. Tennessee Valley Auth.,
297 U.S. 288 (1936) 30-31

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 30

Carey v. Population Servs., Int'l,
431 U.S. 678 (1977) 28

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 9 n.10

FCC v. Pacifica Found.,
438 U.S. 726 (1978) ..... *passim*

Fox Television Stations, Inc. v. FCC,
489 F.3d 444 (2d Cir. 2007), *rev'd*, --- U.S. ---,
129 S. Ct. 1800 (2009) 28

Fox Television Stations, Inc. v. FCC,
613 F.3d 317 (2d Cir. 2010) 11-12, 15, 16, 18, 23

Gentile v. State Bar of Nev.,
501 U.S. 1030 (1991) 22

Holder v. Humanitarian Law Project,
--- U.S. ---, 130 S. Ct. 2705 (2010) ...2, 17-18, 20-22

Kremens v. Bartley,
431 U.S. 119 (1977) 30

Liparota v. United States,
471 U.S. 419 (1985) 22

NAACP v. Button,
371 U.S. 415 (1963) 22

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 26, 30

Reno v. ACLU,
521 U.S. 844 (1997) 2, 13-14, 28

Sable Communications of Cal., Inc. v. FCC,
492 U.S. 115 (1989) 28

United States v. Bass,
404 U.S. 336 (1971) 21-22

United States v. Playboy Entm't Group,
529 U.S. 803 (2000) 28

United States v. Williams,
553 U.S. 285 (2008) 21

Washington State Grange v. Washington State Republican Party,
552 U.S. 442 (2008) 30

Constitutional Provisions

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. V ..... *passim*

Statutes

18 U.S.C. § 1464 ..... 1, 7, 12, 21, 23

28 U.S.C. § 2462 ..... 6 n.6

47 U.S.C. § 223 ..... 13 n.16

Regulations

47 C.F.R. § 73.3999(b) 6

Other Authorities—
Federal Communications Commission

Clear Channel Communications, Inc.,
19 FCC Rcd 10880 (2004) 1 n.1

Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue", Forfeiture Order,
23 FCC Rcd 3147 (2008) 10-11, 18 n.20, 29

Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue", Notice of Apparent Liability for Forfeiture,
23 FCC Rcd 1596 (2008) 6-7, 8 n.9

Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,
19 FCC Rcd 4975 (2004) 14 n.17, 24

Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan",
20 FCC Rcd 4507 (2005) 18 n.20

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order,
21 FCC Rcd 2664 (2006) 18 n.20

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Order,
21 FCC Rcd 13299 (2006) 18 n.20

Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement,
16 FCC Rcd 7999 (2001) 7-8, 11 n.12, 14 n.17

Infinity Broad. Corp. of Pa.,
2 FCC Rcd 2705 (1987) 24 n.25

Infinity Broad. Corp. of Pa.,
3 FCC Rcd 930 (1987) 10

Letter from Norman Goldstein to David Molina,
File No. 97110028 (May 26, 1999) 18 n.20

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69 F.C.C.2d 1250 (1978) 18 n.20, 24 n.25

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BRIEF IN OPPOSITION OF RESPONDENTS ABC TELEVISION AFFILIATES ASSOCIATION ET AL.

Introduction

These cases involve whether the Federal Communications Commission ("FCC" or "Commission") may proscribe under 18 U.S.C. § 1464 instances of fleeting expletives and momentary glimpses of buttocks. The decisions below held the FCC's indecency enforcement policy so standardless as to be unconstitutionally vague.

The Government contends that these decisions constitute an "extraordinary hobbling" of the FCC's ability to police broadcast indecency and "preclude" the FCC from "effectively implementing statutory restrictions" that the agency has enforced since 1934. Pet. 31. Not true. The decisions below leave untouched the constitutionality of Section 1464. What has changed is not the ability of the FCC to enforce the statutory prohibition but, rather, *how* the agency may enforce it. The decisions below require the FCC to develop standards that give fair notice to broadcasters of what is, or is not, indecent within the meaning of the statute and the limits of the First Amendment.

The Government contends that this is a "difficult (if not impossible)" task. Pet. 31. Again, not true. For 30 years following *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the FCC enforced an indecency policy with restraint. That policy was not toothless,[1]

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[1] For example, that policy resulted in instances of

and it was sensitive to the constitutional limits of the FCC's reach. Putting aside that 30-year history, even if the task were "difficult," the Constitution demands no less.

The Government also contends that the decisions below conflict with decisions of the D.C. Circuit that foreclose the lower courts from holding the FCC's indecency enforcement policy to be unconstitutionally vague. *See* Pet. 21-22. However, the Government fails entirely to cite, let alone consider, this Court's intervening decision in *Reno v. ACLU*, 521 U.S. 844 (1997), which found a definition of "patently offensive" that is virtually identical to the FCC's definition of indecency to be vague.

The Government further contends that this Court's recent decision in *Holder v. Humanitarian Law Project*, --- U.S. ---, 130 S. Ct. 2705 (2010), restricted the ability of the court below to reach a determination that the FCC's indecency enforcement policy is unconstitutionally vague because it was bound to apply the agency's policy to the "facts of the actual broadcasts before it." Pet. 23. But *Holder* did not rein in the contours of the Due Process Clause's vagueness jurisprudence, and it does not preclude vagueness determinations based upon factual circumstances vis-à-vis hypothetical situations. In fact, the decisions below are consistent both with *Holder* and with other determinations by this Court

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multi-million dollar settlements for indecency violations. *See Viacom Inc.*, 19 FCC Rcd 23100 (2004) (adopting Consent Decree agreeing to $3,500,000 settlement); *Clear Channel Communications, Inc.*, 19 FCC Rcd 10880 (2004) (adopting Consent Decree agreeing to $1,750,000 settlement).

finding restrictions on speech to be unconstitutionally vague.

The Government's hyperbole, failure to acknowledge relevant cases, and misconstruction of precedent suggest that the Government recognizes that it does not have good reasons for this Court to take these cases. While the Government has spiced up its Petition in an effort to entice the Court—for example, by citing the title of the challenged *NYPD Blue* episode, *Nude Awakening* (Pet. 14), which was never broadcast to viewers, and by detailing partial shots of the actress's breasts (Pet. 14), which were *not* part of the FCC's indecency finding—the Court should reject the Government's solicitation and permit the remand to the agency to formulate an indecency enforcement policy consistent with the Constitution.

Statement of the Case

1. *NYPD Blue* ran for 12 television seasons on the ABC Television Network at 10:00 p.m. Eastern/Pacific Time, 9:00 p.m. Central/Mountain Time, from September 1993 through March 2005. Distinctive from the outset,[2] *NYPD Blue* was one of the most lauded shows in television history: Among other accolades, the gritty police drama garnered 84 Emmy nominations and 20 Emmy awards, including Outstanding Drama Series and

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[2] The pilot episode itself ended with a dimly-lit lovemaking scene containing partial male and female nudity. *See* NYPD Blue, Wikipedia, *available at* http://en.wikipedia.org/wiki/Nypd_blue; NYPD Blue, Museum of Broadcast Communications, *available at* http://www.museum.tv/archives/etv/N/htmlN/nypdblue/nypdblue.htm.

Outstanding Writing for a Drama Series,[3] two Peabody Awards, three Humanitas Awards for Best Writing, a National Board of Review award for Best Television Series, awards from Viewers for Quality Television for Best Drama and acting, and many Golden Globe awards. Despite its realistic portrayal of adult situations, including occasional partial nudity, the show was never found to have crossed the legal line during its long television broadcast run.

The indecency determination that precipitated this litigation arose from one brief scene containing adult female rear nudity in an episode of *NYPD Blue* that aired on February 25, 2003, during the show's tenth season. The scene in question was part of a broader story arc, developing over many months, involving the relationship between lead character Andy Sipowicz and fellow detective Connie McDowell. Sipowicz, a widower, is struggling to raise his 8-year-old son Theo at the same time that his relationship with McDowell is becoming serious. Eventually, Sipowicz and McDowell decide to move in together, which leads to the scene in question.

In the 57-second scene, McDowell has entered the bathroom and is preparing to shower when Theo, just getting out of bed and unaware she is in the bathroom, opens the door and sees McDowell. Both are surprised and embarrassed. McDowell covers herself with her hands and arms, Theo exits and says "sorry," and McDowell, still covering herself,

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[3] *See* Advanced Primetime Awards Search, Academy of Television Arts & Sciences, *available at* http://www.emmys.tv/awards/awardsearch.php.

says through the now-closed door, "It's okay, no problem." No sexual or excretory activities or organs are depicted or described during the scene.[4]

The challenged scene, placed in context, is integral to the episode's storytelling of the awkwardness and discomfiture accompanying the introduction of a new romantic partner into the life of a single parent and his only child, specifically, and the multifaceted aspects of humanity through interrelationships, more generally. Drama requires conflict and resolution, and the *NYPD Blue* storytellers exercised editorial discretion in choosing to illustrate those broad lessons in the scene involving McDowell and Theo.

Mindful of the episode's content, the network voluntarily applied a rating of TV-14-DLV to the challenged *NYPD Blue* episode. The TV-14 rating means

> Parents Strongly Cautioned—This program contains some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended.[5]

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[4] *See* note 21, *infra*.

[5] The TV Parental Guidelines, *available at* http://www.tvguidelines.org. The purpose of these voluntary program ratings is two-fold. *First*, program ratings alert parents to the type of material that a program contains so that they can exercise their own independent, contemporaneous

The "D" designation means "intensely suggestive language." The "L" designation means "strong coarse language." The "V" designation means "intense violence."

In addition, the episode was preceded by a visual and audio warning that stated, "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED."

The episode aired at 10:00 p.m. in the Eastern and Pacific time zones and 9:00 p.m. in the Central and Mountain time zones—the last hour of prime time but, in the Central and Mountain time zones, outside the FCC's regulatory "safe harbor" for broadcast indecency. *See* 47 C.F.R. § 73.3999(b).

2. Four years and 11 months after the episode was broadcast,[6] and several years after the series had ended its long television run, the FCC, on January 25, 2008, issued a Notice of Apparent Liability for Forfeiture ("*Notice*")[7] declaring its intent to challenge this particular episode as indecent.[8] On

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judgment about whether that type of material is appropriate for their children to watch. *Second*, program ratings enable parents with a V-chip-equipped television set to block the type of programs that they have determined in advance to be unsuitable for their unsupervised children.

[6] A five-year statute of limitations was about to run. *See* 28 U.S.C. § 2462.

[7] *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 1596 (2008) (Pet. App. 215a).

February 11, 2008, oppositions to the *Notice* were filed by ABC, Inc. and its two cited owned-and-operated stations and by the ABC Television Affiliates Association and 50 cited member stations.

The *Notice* invoked the FCC's longstanding definition of "broadcast indecency" as

> language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.

Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 FCC Rcd 7999, ¶ 4 (2001) ("*Policy Statement*") (quotations omitted). With respect to the "patently offensive" component of the indecency standard, the *Policy Statement* identified three "principal factors" that inform the analysis of patent offensiveness:

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[8] The issuance of the *Notice* deviated from the Commission's standard practice, which is to send a letter of inquiry to a broadcast licensee to commence an indecency investigation and to provide the licensee a copy of any viewer complaint. The FCC never sent a letter of inquiry to any of the cited ABC affiliates nor did the *Notice* include any of the complaints. Copies of the complaints were provided only after various affiliates submitted formal FOIA requests and just days before a response was due, and, even then, the FCC failed to provide complaints by the filing deadline against eight stations it had already found apparently liable.

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

Policy Statement, ¶ 10 (emphases omitted).

Despite its insistence that its indecency standard relies on "context," the FCC's presumptive indecency finding failed to contextualize the scene at issue. Most importantly, the nudity in question was brief and entirely non-sexual. During the scene, McDowell, standing in front of a mirror, removes her robe as she prepares for her shower, and McDowell's full buttocks are visible for approximately 2 2/3 seconds. McDowell then walks toward the shower and is seen in profile with her buttocks visible from one side for approximately 1.9 seconds. The scene shifts to Theo getting out of bed and walking to the bathroom; the camera then cuts back to McDowell preparing to step into the shower. McDowell's full buttocks are visible again for approximately 2 1/4 seconds. Thereafter, Theo and McDowell are both surprised and embarrassed, and McDowell's nudity is subsequently covered in the remainder of the scene.[9] In sum, McDowell's full buttocks are visible

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[9] Although the Petition makes repeated mention of partial shots of the actress's breast, *see* Pet. 14-15, the FCC's indecency determination was predicated on the brief depiction of her

for less than 5 seconds, and her buttocks are visible from the side for less than 2 seconds, which, together, constitute approximately 12% of the entire 57-second scene and less than 0.25% of the entire hour-long episode. In opposition to the *Notice*, the ABC affiliates emphasized that the exceedingly brief nudity at issue is manifestly not "dwelled on or repeated."

The FCC likewise failed to give weight to the fact that a later scene shows McDowell worrying about the incident, reading a book about raising children, and expressing her embarrassment to a colleague. She also asks Sipowicz whether Theo was all right when Sipowicz dropped him off at school, and he attempts to put her at ease. Other story lines in the episode also deal with family and relationships: A man learns that his wife, the mother of his two children, is having an affair and plotting to have him murdered. A detective learns of his father's suicide after they quarreled. McDowell and another detective learn to sympathize with the victim of a petty theft after discovering the victim's only child had been recently killed by a drunk driver. Moreover, subsequent episodes continue the story arc dealing with Theo's adjustment to a new parental figure. The FCC's supposedly "contextual" analysis failed to give appropriate consideration to this brief scene as a part of the larger story arc.[10]

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buttocks. *See* Pet. App. 148a.

[10] *Cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975) ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . [A] motion picture must be considered as a whole.

The FCC likewise ignored critical contextual factors that its own orders have cited, including "the character of the audience" and "the merit of the complained-of program as it relates to the broadcast's patent offensiveness." Pet. 5 (citing *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd 930, 932 ¶ 16 (1987)). *NYPD Blue* was in its tenth television season when the challenged episode aired. It had received numerous awards for its gritty, realistic portrayal of adult situations, occasionally containing partial nudity, and the show's format and content were well-known to its nationwide television viewing audience. With 212 episodes preceding this one, *NYPD Blue* had established a "brand": Viewers knew what *NYPD Blue* was about and the type of material it was likely to contain.

Finally, the FCC gave no weight to the voluntary self-rating and audio and visual subject matter advisory that ABC provided to viewers—a significant component of the "context" of the broadcast.

Notwithstanding the prominent viewer advisory, the show's long history, the brevity of the scene, the non-sexualized nature of the nudity, and the many other relevant measures of "context," the FCC found the challenged scene indecent. In a final order dated February 19, 2008 (the "*Forfeiture Order*"), the FCC imposed an indecency forfeiture of $27,500 on each of 45 television stations—fines totaling $1,237,500.[11]

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and not as isolated fragments or scenes of nudity.").

[11] *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Forfeiture Order, 23 FCC Rcd 3147 (2008) (Pet.

ABC timely paid all of the forfeitures imposed by the Commission, and all Respondents sought judicial review of the *Forfeiture Order*.[12]

3. The United States Court of Appeals for the Second Circuit vacated the FCC's indecency determination, relying on its prior decision in *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010) (Pet. App. 1a).[13] *See ABC, Inc. v. FCC*, 404 Fed. Appx. 530 (2d Cir. 2011) (summary order) (Pet. App. 118a). Applying this Court's long-settled vagueness jurisprudence, the *Fox* panel had held, in July 2010, that "the FCC's policy violates the First Amendment because it is unconstitutionally vague,

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App. 126a). The FCC imposed forfeitures on 43 television stations affiliated with the ABC Television Network (the "ABC Affiliates") as well as two ABC owned-and-operated television stations.

[12] In addition to the constitutional issues discussed below, the ABC Affiliates also challenged the *Forfeiture Order*'s indecency determination as arbitrary and capricious under the Administrative Procedure Act because the brief nudity at issue did not satisfy the FCC's own multi-factor indecency standard articulated in the *Policy Statement*. The ABC Affiliates further argued that the *Order* was arbitrary and capricious given its reliance on form complaints generated by an advocacy group that lacked any indicia that a *bona fide* viewer of the program on each of the cited stations actually complained about the broadcast. Finally, the Affiliates contended that the *Forfeiture Order* deprived them of due process in light of the remarkable delay between the broadcast and the *Notice*, the FCC's belated and incomplete production of the underlying "viewer complaints," and the truncated schedule the agency imposed upon the Affiliates' response.

[13] Respondent ABC Television Affiliates Association has also participated as an intervenor in the *Fox* case.

creating a chilling effect that goes far beyond" its treatment of fleeting materials. *Fox*, Pet. App. 2a.

The Second Circuit concluded that "*Fox*'s determination that the FCC's indecency policy is unconstitutionally vague binds this panel." *ABC*, Pet. App. 124a. That is so, the court reasoned, because "[a]lthough this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found 'impermissibly vague.'" *Id.*

Reasons for Denying the Writ

The Government seeks this Court's review of the Second Circuit's decisions in both *Fox* and *ABC* on the grounds that (1) the judgment that the FCC's indecency standard is unconstitutionally vague in its entirety conflicts with decisions of this Court and the United States Court of Appeals for the D.C. Circuit and (2) the decisions below effectively preclude the enforcement of the statutory prohibition on broadcast indecency contained in 18 U.S.C. § 1464.[14] Neither claim has merit.

I. No Conflict of Authority Warrants This Court's Review

The decisions below involved a straightforward application of long-settled constitutional principles to the FCC's content-based regulation of speech (fleeting expletives in *Fox*; fleeting nudity in *ABC*).

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[14] The statute provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

Nothing in either of those decisions is inconsistent with the application of those principles by this Court or any federal court of appeals, and nothing in the Petition requires this Court's review.

A. There Is No Split of Authority Among the Circuits

The *Action for Children's Television* decisions[15] of the D.C. Circuit provide the sole basis for the Government's contention that a conflict of authority exists among the courts of appeals. *See* Pet. 17, 21-22. Contrary to the Government's suggestion, however, there is no conflict of authority among the federal courts of appeals that warrants review.

To begin with, this Court's 1997 decision in *Reno v. ACLU*, 521 U.S. 844 (1997), significantly altered the legal landscape in the years after the D.C. Circuit's decisions in the *ACT* cases but before the Second Circuit's decisions below.

Reno examined the proscriptions contained in the Communications Decency Act against transmitting "indecent" messages or sending or displaying "patently offensive" material to minors over the Internet.[16] The Court there found these terms to contain so "many ambiguities" as to render their

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[15] *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (*ACT II*); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*ACT III*).

[16] The proscriptions are codified in various provisions of 47 U.S.C. § 223.

vagueness "problematic for purposes of the First Amendment" because such vagueness has an "obvious chilling effect on free speech." *Reno*, 521 U.S. at 870 (first two quotations), 872 (third quotation). Significantly, the CDA's definition of "patently offensive" is virtually indistinguishable from the FCC's definition of indecency.

Obviously, the D.C. Circuit's vagueness rulings could not have been informed by *Reno*. But the Second Circuit's subsequent vagueness rulings follow directly from it. Because the Second Circuit simply decided the vagueness issue in keeping with the later-decided *Reno*, any conflict with the *ACT* cases does not warrant review.

But even had *Reno* not intervened, there would be no conflict between the decisions of the D.C. and Second Circuits, because those courts were effectively considering two very different indecency enforcement schemes. The regulatory indecency policy applied by the FCC in a "restrained" fashion in the 1980s and early 1990s (and at issue in the *ACT* cases) was quite different than the far broader (and more subjective) enforcement policy under consideration in the *ABC* and *Fox* cases.[17] This very

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[17] The FCC first articulated its multi-pronged "patent offensiveness" test in the *Policy Statement* in 2001, several years after the D.C. Circuit's 1995 decision in *ACT III*. The *Policy Statement* reiterated in 2001, however, that "fleeting and isolated" expletives would not be found actionably indecent under the second prong of the patently offensive test. *See Policy Statement*, ¶ 18. The FCC continued to act with "restraint" even under its flexible indecency standard until 2004. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975, ¶ 12 (2004) ("*Golden Globes Order*")

different—and far from "restrained"—current indecency policy both played a significant part in the Second Circuit's decisions and distinguishes the *ACT* cases. The Second Circuit recognized as much. *See Fox*, Pet. App. 22a n.8.

ACT I discussed at some length the FCC's now-abandoned "restrained enforcement policy" and expressly noted its importance to the court's constitutional analysis in that case. *See ACT I*, 852 F.2d at 1340 n.14 (noting the FCC's "assur[ance]" to the court "that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case" so that "the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy"). *ACT II* did likewise. *See ACT II*, 932 F.2d at 1506 (noting that "[t]he Commission, by its own account . . . 'took a very limited approach to enforcing the prohibition against indecent broadcasts'" after *Pacifica*). The FCC concedes that it has abandoned its former restraint—and both orders at issue in the Petition reflect the FCC's new, far broader indecency "standard." In effect, then, the Second Circuit considered a *different* indecency policy than the one at issue in the *ACT* cases—and found that new, altered policy unconstitutionally vague. The decisions of the two courts are readily distinguishable and thus pose no conflict, but, to the

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(declaring for the first time that even a fleeting expletive could be found actionably indecent under the FCC's "contextual" standard). The FCC's indecency policy, at least since 2004, has lacked any indicia of the agency's former "restraint."

extent there is any conflict, it is so insubstantial that it does not merit this Court's review.

Finally, the *ACT* cases did not purport to reach a considered conclusion that the FCC's indecency enforcement policy is not unconstitutionally vague. *ACT I assumed* the absence of fatal vagueness from the facts of the *Pacifica* decision. *See ACT I*, 852 F.2d at 1338-39 ("infer[ring] from [*Pacifica*] that the Court did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'" but "welcom[ing] correction" from "Higher Authority" if the court had misread *Pacifica*).[18] (And, even so, *ACT I* acknowledged that "vagueness is inherent in" the indecency standard. *Id.* at 1344.) *ACT II* simply reiterated, without analysis, *ACT I*'s vagueness discussion. *See ACT II*, 932 F.2d at 1508 ("We have already considered and rejected a vagueness challenge to the Commission's definition of indecency." (citing *ACT I*)). And *ACT III* placed the same (misplaced) reliance on *Pacifica*. *See ACT III*, 58 F.3d at 659 ("The FCC's definition of indecency in the [challenged] regulations is identical to the one at issue in *ACT II*, where we stated that 'the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [Commission's] definition,' as did our holding in *ACT I*."). The Second Circuit correctly noted in *Fox* (*see* Pet. App. 22a n.8) that the *ACT* decisions pose no conflict.

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[18] *See also ACT I*, 852 F.2d at 1338 (noting that *Pacifica* "did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague" (footnote omitted)).

B. The Decisions Below Do Not Conflict with Decisions of This Court

Contrary to the Government's argument, the Second Circuit's decisions also do not conflict with this Court's decisions in *Pacifica* or *Holder v. Humanitarian Law Project*, --- U.S. ---, 130 S. Ct. 2705 (2010). Quite the contrary, since *Pacifica*, in fact, establishes that the Commission's new and infinitely malleable "context-based" indecency standard runs afoul of the First Amendment, as discussed more fully in Section II, *infra*.

To begin with, *Pacifica* was silent as to whether the agency's indecency definition was unconstitutionally vague while predicated on the Commission's promise to enforce that definition in a restrained manner. *Pacifica* considered only whether the FCC's indecency definition was unconstitutional *as applied* to the 12-minute Carlin monologue broadcast in the middle of the afternoon at a time when children were in the audience. That is all that was before the Court in *Pacifica*—and all that the Court there decided. *See Pacifica*, 438 U.S. at 735 (declaring that "the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast"); *id.* at 742 (noting that "our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast"); *id.* at 755-56 (Powell, J., concurring in part and concurring in the judgment) (agreeing that "[t]he Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock

in the afternoon, and not the broad sweep of the Commission's opinion").

Holder, likewise, poses no conflict. The Second Circuit correctly found *Holder* "inapposite" given "the entirely different procedural posture" in which the case arose. *Fox*, Pet. App. 30a n.9. *See Holder*, 130 S. Ct. at 2714, 2720; *id.* at 2716 (noting that the *Holder* plaintiffs did "not challenge the [disputed] statutory terms in all their applications"); *id.* at 2718 (addressing "the question whether the material-support statute, as applied to plaintiffs, is impermissibly vague under the Due Process Clause of the Fifth Amendment"). The *Holder* passages quoted in the Petition express the Court's admonition that the vagueness challenge must be evaluated on the basis of the plaintiffs' own speech and acts, not on the basis of hypothetical speech or actions by others.[19] *See id.* at 2718-19.

But in this case, unlike *Holder*, the broadcasters' vagueness challenges *are* predicated on their *own* speech (which the FCC has punished under its indecency standard), not on the hypothetical speech of others.[20] (*Holder*, it bears noting, was a

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[19] That distinction explains the Government's carefully-worded suggestion that the Second Circuit's "*approach*"—not its analysis or its judgment—"is inconsistent with" *Holder*. Pet. 17 (emphasis added).

[20] The Petition's suggestion that the Second Circuit "failed entirely to ask whether Fox or ABC lacked adequate notice that the particular broadcasts at issue here would be considered indecent" (Pet. 18) is flatly wrong. That is precisely the question the Second Circuit addressed (*see Fox*, Pet. App. 22a-23a), and it answered that question in the negative based on its determination that the FCC's "standard" is one that even

the FCC itself has been wholly unable to articulate or apply with any consistency. The court illustrated that point by "examining other FCC orders involving different broadcasts" (Pet. 18), but it did so—quite appropriately—to determine whether the FCC's prior orders give broadcasters sufficient notice of where the FCC draws the indecency line. Those orders, several of which the Second Circuit referenced, make clear that broadcasters, in fact, lack the constitutionally-mandated notice. *Compare WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, ¶¶ 11, 13 (2000) (finding broadcast nudity, including two extended scenes containing full frontal nudity, in *Schindler's List* not indecent); Letter from Norman Goldstein to David Molina, File No. 97110028 (May 26, 1999) (dismissing indecency complaint challenging depiction of full buttocks for 30 seconds in broadcast of the movie *Catch-22* on the ground that the televised nudity was "very brief"); and *WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶¶ 2, 10 (1978) (dismissing complaint challenging scenes of nudity in *Monty Python's Flying Circus* given absence of evidence that the broadcaster had engaged in the type of repeated shock treatment necessary to trigger action under *Pacifica*) *with Forfeiture Order*, ¶ 18 (finding less than seven seconds of adult rear nudity actionably indecent); *compare Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, ¶ 141 (2006) ("*Omnibus Order*") (finding woman's use of the term "bullshitter" during live interview indecent because it aired "during a morning news interview") *with Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299, ¶¶ 71-73 (2006) ("*Omnibus Remand Order*") (finding the same use of the term "bullshitter" *not* actionably indecent *because* it was used "during a *bona fide* news interview"); *compare Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 FCC Rcd 4507, ¶ 14 (2005) (finding numerous expletives uttered during television broadcast of the fictional movie *Saving Private Ryan* not indecent because deletion of the expletives "would have altered the nature of the artistic work

"preenforcement challenge," 130 S. Ct. at 2722, while the broadcasters' challenge here is a post-enforcement one.) But nothing in *Holder*'s analysis or holding precludes a party from challenging the Commission's indecency policy, just as the broadcasters have done in this litigation.

Unlike *Holder*, the broadcasts at issue in these cases were not "clearly proscribed" by the FCC's indecency standard. *Cf. Holder*, 130 S. Ct. at 2719 (noting that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice" and "certainly cannot do so based on the speech of others"). Indeed, the broadcasters' vagueness challenge to the indecency standard is not predicated on an argument that the standard "applies to a substantial amount of protected expression"—essentially an overbreadth challenge[21]—but instead on the very argument that

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and diminished the power, realism and immediacy of the film experience for viewers") *with Omnibus Order*, 21 FCC Rcd at ¶ 82 (finding expletives used by real musicians during PBS documentary *The Blues: Godfathers and Sons* indecent because the educational purpose of the film "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives").

[21] Respondents observe that there may be overbreadth issues with the FCC's indecency enforcement policy as well. For instance, in *ABC* the FCC has sanctioned the brief depiction of buttocks but, anatomically, buttocks have no sexual or excretory function and, therefore, ought to fall outside the narrowing construction the FCC has given to Section 1464's prohibition against the broadcast of "indecent" language. *Compare* W.D. Gardner & W.A. Osburn, ANATOMY OF THE HUMAN BODY 223-25 (3d ed. 1978) (describing buttocks as part of the muscular system) *with* R.T. Francouer, COMPLETE

Holder made clear the plaintiffs in that case could have made (but did not): that the FCC itself has been unable to interpret and apply the "standard" in a consistent manner so that "'person[s] of ordinary intelligence'" can have "'fair notice of what is prohibited.'" *Holder*, 130 S. Ct. at 2720 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). The inconsistency and unpredictability inherent in the FCC's indecency decisions give broadcasters no certain basis for determining at the outset whether their (constitutionally protected) speech will be found to run afoul of the FCC's ever-shifting "contextual" analysis.

In any event, *Holder* distinguished the statute at issue in that case from statutes (like Section 1464) that proscribe "indecent" speech—statutory language the Court has elsewhere found to be unconstitutionally vague under the "more stringent vagueness test" applicable to regulation of speech. *See Holder*, 130 S. Ct. at 2719, 2720.[22] Moreover, it is significant that Section 1464 is a *criminal* statute, which the rule of lenity requires be construed narrowly, *see, e.g.*, *United States v. Bass*, 404 U.S.

DICTIONARY OF SEXOLOGY 588 (2d ed. 1995) (defining sexual organs biologically) *and* Gordon Alexander, GENERAL BIOLOGY 203-04 (2d ed. 1962) (describing excretory system in humans).

[22] *Holder* described terms such as "indecent" as inviting "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Holder*, 130 S. Ct. at 2720. *Holder*'s general observation rings true here. Even the agency's purported narrowing construction (in the form of its multi-factor standard for patent offensiveness) empowers the FCC to make "wholly subjective" and hopelessly inconsistent judgments about the artistic merit of constitutionally protected speech. *See* note 20, *supra*.

336, 348 (1971); *Liparota v. United States*, 471 U.S. 419, 427 (1985), and which is subject to a particularly strict test for vagueness where First Amendment interests are implicated, *see, e.g.*, *NAACP v. Button*, 371 U.S. 415, 432-33 ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), which *Holder* distinguished, supports the Second Circuit's decisions in these cases. As *Holder* noted, "the asserted vagueness in [the challenged] state bar rule was directly implicated by the facts before the Court." *Holder*, 130 S. Ct. at 2721 (citing *Gentile*, 501 U.S. at 1049-51). The fatal vagueness inherent in the rule challenged in *Gentile* is the same flaw the Second Circuit identified in the FCC's indecency standard: a party potentially subject to the challenged rule "must guess at its contours." *Gentile*, 501 U.S. at 1048. The Second Circuit's vagueness ruling with respect to the FCC's standard is fully consistent with this Court's vagueness determination in *Gentile*.

C. Allowing the Second Circuit's Remand to the FCC to Proceed, Rather Than Granting the Petition, Is the Appropriate Course

Review is also not warranted by the Government's assertion that the Second Circuit's decisions effectively preclude the FCC from

performing its statutory obligation to enforce prohibitions on broadcast indecency. *See* Pet. 18, 31. The decisions below did not purport to hold Section 1464 unconstitutional or to disturb in any other respect the FCC's regulatory authority to enforce the statutory prohibition. They simply established that the FCC's most recent attempt to enforce the prohibition by means of its multi-factor "contextual" standard cannot be reconciled with the Constitution. The Second Circuit was emphatic that its decisions should not be read to suggest that *no* indecency enforcement regime could be created in keeping with the First Amendment, only that the FCC's present attempt did not comport with the constraints imposed by the Constitution.

The Second Circuit directed the FCC, on remand, to create an indecency standard that provides the certainty required by the First Amendment. *See Fox*, Pet. App. 30a ("[T]he FCC should bend over backwards to create a standard that gives broadcasters the notice that is required by the First Amendment." (footnote omitted)); *id.* 34a ("We do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC's current policy fails constitutional scrutiny."). Allowing the Second Circuit's remand to enable the Commission to develop a more precise indecency standard prior to this Court's constitutional review—one that will provide broadcasters with the notice required by the First Amendment—is appropriate.

And that task is not an impossible one, contrary to the contention in the Petition. Indeed, for nearly 30 years, the FCC applied an indecency enforcement regime with restraint, such that it was subject to few

legal challenges, let alone a finding of unconstitutionality.[23] From the time of the Commission's 1975 adjudication that led to this Court's *Pacifica* decision until the agency's abrupt change of policy in the *Golden Globes Order*[24] in 2004, the FCC's refusal to find a single, non-literal expletive actionably indecent comported with *Pacifica*'s holding.[25] Only since 2004, when the FCC first departed from its longstanding policy in favor of a subjective approach that leaves broadcasters (and

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[23] The FCC's indecency determinations during this period were resolved by agreement with broadcasters or by the payment of fines imposed by the agency. *See, e.g.*, note 1, *supra* (citing cases). This does not mean, however, that broadcasters conceded that the policy was constitutional or that the FCC applied its policy in a manner consistent with constitutional limitations in every case.

[24] *See Golden Globes Order*, 19 FCC Rcd at ¶¶ 8-12 (finding indecent singer Bono's exclamation upon winning a 2003 Golden Globe Award that "this is really, really, fucking brilliant").

[25] Indeed, for nearly thirty years after *Pacifica*, the FCC itself read the case to draw a firm constitutional line between deliberate, repetitive language of the kind at issue in *Pacifica*, on the one hand, and isolated instances of "indecent" language, on the other. And the FCC limited its enforcement actions accordingly. *See, e.g.*, *WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶ 10 (1978) (expressing FCC's "inten[tion] strictly to observe the narrowness of the *Pacifica* holding," which "relied in part on the repetitive occurrence of the 'indecent' words" in the Carlin monologue); *Pacifica Found.*, 2 FCC Rcd 2698, ¶ 13 (1987) ("deliberate and repetitive use [of expletives] in a patently offensive manner is a requisite to a finding of indecency"); *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd 2705, ¶ 7 (1987) ("Speech that is indecent *must* involve more than the isolated use of an offensive word." (emphasis added)). Beginning with the *Golden Globes Order*, the FCC's reading of *Pacifica* changed dramatically, but *Pacifica*'s holding has not.

courts) perpetually bewildered about what constitutes "indecency," have the contours of the indecency policy come under sustained legal attack. History itself therefore demonstrates the groundlessness of the Government's suggestion (*see* Pet. 29-31) that the FCC's regulatory task after the Second Circuit's rulings is an impossible one.

The Petition makes much of breasts and buttocks and nudity and expletives but that, alone, does not make these cases worthy of the Court's review. There is no conflict among circuits, no conflict with this Court's opinions, and no significant issue of constitutional import. The Petition should be denied.

II. If the Court Grants the Petition, It Should Also Consider Whether Settled Constitutional Principles, As Applied to the Facts of This Case, Permit the FCC to Proscribe the *NYPD Blue* Broadcast

Although the ABC Affiliates maintain that nothing in the Petition warrants review by this Court, should the Court grant the Petition to consider whether the FCC's new indecency enforcement policy is unconstitutionally vague in its entirety, the ABC Affiliates respectfully request that the Court also agree to consider the related question whether the FCC's determination in this case that the brief, non-sexualized depiction of adult buttocks as broadcast in this particular episode of *NYPD Blue* is actionably indecent is consistent with the limitations of the Due Process Clause and *Pacifica* as applied to the facts of this case. An answer to

that question, were the Court to grant the Petition, will provide necessary guidance to the FCC in any attempt by the agency to formulate an indecency standard that comports with the First Amendment, and the question itself is closely related to—indeed, is essentially encompassed within—the question the Government has asked the Court to review: whether the FCC's indecency policy is unconstitutional "in its entirety." It is, however, unnecessary and, in light of this Court's longstanding jurisprudential rule against deciding constitutional issues unnecessarily, inappropriate to go beyond the application of *Pacifica* to decide other constitutional issues not essential to the decision in this case. In particular, there is no need to resolve the broader First Amendment issues surrounding regulation of broadcast indecency and the congressionally-mandated public trustee regulatory framework this Court approved in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

1. Respondents submit that the FCC's application of its indecency policy in *ABC* cannot be sustained in light of this Court's decision in *Pacifica*. *Pacifica* supplies the analytical framework that determines the constitutionality of the FCC's decision, and it makes clear that the fleeting nature of the nudity depicted in the challenged episode of *NYPD Blue* may not be proscribed.

This Court's decision in *Pacifica* did not simply validate the FCC's regulation of the daytime broadcast of George Carlin's "Filthy Words" monologue; it established the constitutional limits of the FCC's authority to regulate broadcast indecency. In particular, in a portion of the opinion that

commanded a majority of the Court, *Pacifica* noted that its "narrow[]" holding does not sanction the exercise of Commission regulatory authority over an isolated expletive or a fleeting image: This Court in *Pacifica* expressly did not "decide[] that an occasional expletive in [an Elizabethan comedy] would justify any sanction . . . ." *Pacifica*, 438 U.S. at 750.

Any doubt about the narrow scope of the regulatory authority endorsed by *Pacifica* is eliminated by the separate concurring opinion of Justice Powell, without which there would have been no majority. Writing separately to underscore that *Pacifica* should not be read to confer upon the FCC "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from *momentary* exposure to it in their homes," *id.* at 759-60 (Powell, J., concurring in part and concurring in the judgment) (emphasis added), Justice Powell approved of FCC regulatory authority of only the narrowest scope:

> The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.

Id. at 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added). *See also id.* at 771 (Brennan, J., dissenting) (noting that

the plurality and concurring opinions "do no more than permit the Commission to censor the afternoon broadcast of the 'sort of verbal shock treatment' . . . involved here" but otherwise seek to "insure that the FCC's regulation of *protected speech* does not exceed these bounds" (emphasis added)). Justice Powell's opinion, then, makes clear where *Pacifica* drew the line between permissible regulation of speech and unlawful censorship: *Pacifica* allowed the FCC to regulate the "verbal shock treatment" administered by the Carlin monologue but did not approve the suppression of other categories of protected speech, including "isolated" offensive words or glimpses of nudity.

Pacifica carved out only an exceedingly narrow *exception* to the background rule of full constitutional protection for indecent speech. *See, e.g., Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[E]xpression which is indecent but not obscene is protected by the First Amendment . . . ."); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); *United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (2000); *Reno*, 521 U.S. at 874. The Second Circuit previously acknowledged the protection of even indecent speech as the background rule against which *Pacifica* operated. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007) ("*all* speech covered by the FCC's indecency policy is fully protected by the First Amendment" (emphasis in original)), *rev'd on other grounds*, --- U.S. ---, 129 S. Ct. 1800 (2009). Read in light of this settled rule, then, *Pacifica*

approved of FCC prohibition of broadcast indecency in only the narrowest of circumstances—leaving all indecent speech *other than* the "verbal shock treatment" (or its visual equivalent) at issue there fully protected against regulation.

Applying *Pacifica* to the *NYPD Blue* broadcast at issue requires rejection of the FCC's attempt to expand its regulatory authority over otherwise-protected "indecent" speech. It is impossible to equate the pre-recorded 12-minute Carlin monologue at issue in *Pacifica*—a "verbal shock treatment" "repeated over and over," *Pacifica*, 438 U.S. at 757 (Powell, J., concurring in part and concurring in the judgment)—with the momentary, fleeting, and isolated glimpse of an actress's buttocks in an hour-long, critically-lauded prime time adult drama, preceded by visual and auditory warnings about mature subject matter, that had been on the air for a decade and was broadcast at a time of night when children were unlikely to be in the audience.[26] *Pacifica*'s narrowly-circumscribed approval of the FCC's proscription of the Carlin monologue confirms that the FCC's new indecency policy prohibiting the broadcast of even an isolated, unrepeated expletive or fleeting glimpse of adult nudity cannot be squared with the First Amendment.

Pacifica compels the conclusion that the *Forfeiture Order* cannot constitutionally proscribe the fleeting and non-sexualized depiction of buttocks.

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[26] Those same considerations compel the conclusion that the FCC's multi-factor indecency standard is unconstitutionally vague *as applied* to the *NYPD Blue* episode at issue, for the reasons noted above.

For essentially the same reasons, *Pacifica* compels the conclusion that the fleeting expletives at issue in the *Fox* case likewise cannot be constitutionally proscribed. These straightforward, determinative applications of *Pacifica* are another reason why the Court should deny the Petition, but, should the Court choose to grant the Petition, it should also consider and apply settled First Amendment and vagueness jurisprudence to the specific broadcasts in issue.

2. Because the judgments below can be upheld either on the grounds set forth by the Second Circuit or by application of settled constitutional principles to the *NYPD Blue* broadcast and to the *Fox* award shows broadcasts, it is neither necessary nor appropriate for the Court to go beyond those bases to decide these cases. In particular, it is unnecessary for the Court to reconsider the "special treatment" given the regulation of broadcast indecency, *see Pacifica*, 438 U.S. at 748-50; *see also id.* at 757-60 (Powell, J., concurring in part and concurring in the judgment), or the congressionally-mandated public trustee regulatory framework for broadcast media the Court approved in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). It is a long-settled jurisprudential rule that the "Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Kremens v. Bartley*, 431 U.S. 119, 136 (1977) (internal quotation marks and citation omitted); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (same); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (same); *see generally Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288,

346-47 (1936) (Brandeis, J., concurring) (declaring that the "Court will not anticipate a question of constitutional law in advance of the necessity of deciding it" (internal quotation marks and citation omitted)). Consistent with these long-established prudential principles, the Court should not reach out to address additional constitutional issues such as the principles underlying the Court's decisions in *Pacifica* and *Red Lion* that are unnecessary to the resolution of this case.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Wade H. Hargrove
Counsel of Record
Mark J. Prak
David Kushner
Julia C. Ambrose
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
150 Fayetteville Street
Suite 1600
Raleigh, N.C. 27601
919.839.0300
whargrove@brookspierce.com

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IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF INTERVENORS CENTER FOR CREATIVE VOICES IN MEDIA AND THE FUTURE OF MUSIC COALITION

*Andrew Jay Schwartzman
Chrystiane B. Pereira
Media Access Project
1625 K Street, NW
Suite 1000
Washington, DC 20006
(202) 232-4300
andys@mediaaccess.org

* Counsel of Record

May 23, 2011

QUESTION PRESENTED

Whether the court of appeals properly determined that the Federal Communications Commission's (FCC) context-based indecency policy is unconstitutionally vague and accordingly unenforceable.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Center for Creative Voices in Media and Future of Music Coalition (jointly "Center") respectfully submit this corporate disclosure statement. The Center of Creative Voices in Media does not have a parent company and no publicly held company owns 10 percent or more of stock therein. The Future of Music Coalition does not have a parent company and no publicly held company owns 10 percent or more of stock therein.

TABLE OF CONTENTS

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES iv
REASONS FOR DENYING THE PETITION 1
CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

Associated Press v. United States, 326 U.S. 1 (1945) 3
FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978) 3
FCC v. Pacifica Found., 438 U.S. 726 (1978) 1, 3, 4
Fox TV Stations v. FCC, 280 F.3d 1027 (D.C. Cir. 2002) 2
Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) 2
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 1, 3, 5
Sable Commc'ns, Inc. v. FCC, 491 U.S. 115 (1987) 3
Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 1027 (D.C. Cir. 2002) 2
Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 2

Statutes

124 Stat. 4071 6

Administrative Orders

Pacifica Found., Inc., 2 FCCRcd 2698 (1987) 4

Other Authorities

Connecting America: National Broadband Plan, at http://download.broadband.gov/plan/national-broadband-plan-chapter-5-spectrum.pdf. 6

TABLE OF AUTHORITIES—Continued

Page

FCC Chairman Genachowski Prepared Remarks at NAB Show 2011 ("Genachowski NAB Remarks"), Apr. 12, 2011, at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0412/DOC-305708A1.pdf 5, 7

Jasmin Melvin, Reuters, "FCC head says mergers can't solve the spectrum crunch," Apr. 13, 2011, at http://www.msnbc.msn.com/id/42566661/ns/technology_and_science-wireless 7

"Latta Bill Would Authorize Incentive Auctions, But Talks Continue," COMM. DAILY, Apr. 19, 2011, at http://www.capitolsolutions.com/CommDaily.4.19.11.pdf..... 5

Lee Petro, "Three Incentive Auction Bills Introduced in Congress," Comm. Daily Blog. Mar. 10, 2011, at http://www.commlawblog.com/2011/03/articles/broadcast/three-incentive-auction-bills-introduced-in-congress/..... 5

REASONS FOR DENYING THE PETITION

I. The Court of Appeals properly invalidated the FCC's "indecency" findings at issue, which relied on application of an unconstitutionally vague, context-based policy. Neither the Court of Appeals nor the FCC revisited or relied upon *Red Lion Broadcasting Co. v. FCC*, [1] respectively, in reaching their differing decisions. Yet in an earlier opinion in this case, one member of this Court wrote separately to express his belief that "*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity." *FCC, et al. v. Fox Television Stations, Inc., et al.*, 129 S. Ct. 1800, 1820 (2009) (Thomas, J., concurring). "[E]ven if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*," the same continued, "dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago." *Id.* at 1821.

II. This case presents a poor vehicle for revising *Red Lion*. The policies here at issue are unconstitutionally vague without reference to either *Pacifica*[2] or *Red Lion*. In any event, *Red Lion* is inapposite and, like its "spectrum scarcity" rationale, irrelevant to this case. The precedent for broadcast indecency is not *Red Lion* but *Pacifica*, which holding did not rely on *Red Lion* or spectrum scarcity. *Red Lion* serves as precedent for different, wider ranging types

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[1] 395 U.S. 367 (1969) ("*Red Lion*").

[2] *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

of laws and responds to different governmental interests than the Court's narrower *Pacifica* holding, and even the prospect of reconsideration would wreak havoc in ongoing media, broadband and spectrum policy debates at the FCC and in Congress. Moreover, whether or not "spectrum scarcity" at one time had ceased to be a policy problem, it is certainly one now. Spectrum is more scarce and valuable in the sense this Court earlier contemplated in *Red Lion*. Thus *Red Lion* would be a red herring here.

a. In *Red Lion*, this Court unanimously held that the judiciary should defer to attempts by Congress and the FCC to structure access to spectrum where governmental intent and effect is to promote the widest dissemination of information from diverse and antagonistic sources under the First Amendment.[3] To reach this holding, the Court applied a "less rigorous standard of First Amendment scrutiny,"[4] which several circuit courts since have described as "rational basis,"[5] and which this Court since has applied to uphold laws or regulations that are "a reasonable means"

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[3] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("Turner I") ("[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (internal quotations and citations omitted)).

[4] *See Turner I*, 512 U.S. 622, 637 (1994).

[5] *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 167 (D.C. Cir. 2002); *Fox TV Stations v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002).

of "promoting the public interest in diversified mass communications."[6]

b. *Red Lion* and *Pacifica* rest on entirely different bases. While the latter rests on broadcast media's pervasiveness, invasiveness and accessibility to children,[7] the former rests on "the scarcity of broadcast frequencies," "legitimate claims" of their "possible users," and the "government's role in allocating" them.[8] These bases correspond to the differing governmental interests furthered by indecency cases – to protect children from harmful materials[9] – and by *Red Lion*'s line – to ensure the public's rights to "receive suitable access to social, political, esthetic, moral and other ideas and experiences,"[10] to "the widest dissemination of diverse and antagonistic sources," [11] and correspondingly to the most effective use of the spectrum for communication. The Court affirmed the separation of the two cases when more narrowly ruling that a particular program "as broadcast" was indecent in *Pacifica*.[12] Though the FCC order upheld in *Pacifica* listed

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[6] *See FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 802 (1978) ("*FCC v. NCCB*").

[7] *Pacifica*, 438 U.S. at 748-51.

[8] *See Red Lion*, 395 U.S. at 400-01.

[9] *See, e.g., Sable Commnc'ns, Inc. v. FCC*, 491 U.S. 115, 126 (1987).

[10] *See Red Lion*, 395 U.S. at 390.

[11] *See Associated Press v. United States*, 326 U.S. 1, 20 (1945).

[12] *See Pacifica*, 438 U.S. at 734, 742 ("Our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast....").

scarcity among its bases for authority, the Court explicitly rejected grounding indecency regulation on the *Red Lion* scarcity rationale.[13] Subsequently the Commission itself abandoned scarcity as a justification for indecency regulation.[14]

c. *Red Lion* and *Pacifica* apply to different types of laws. *Pacifica*'s constitutional holding applies exclusively to laws *restricting* indecency. By contrast, *Red Lion* applies to a broader discourse-*promoting* body, such as laws structuring the media so as to ensure widest dissemination by diverse sources (e.g. spectrum policy rules, ownership limits, universal service mandates) and promoting political, education and noncommercial content toward building an informed citizenry.

Recent events make this an even less appropriate vehicle for *Red Lion*'s reexamination – "spectrum scarcity" as contemplated in *Red Lion*[15]

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[13] *Id.* at 731, n 2. *See also id.* at 770, n 4. ("The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of spectrum scarcity to support their result. As Chief Judge Bazelon noted below, although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship." (Brennan, J., dissenting) (internal quotations and citations omitted)).

[14] *Pacifica Found., Inc.*, 2 FCCRcd 2698, 2699 (1987), *aff'd on recon., Infinity Broadcasting Corp. of Pa.*, 3 FCCRcd 930 n. 11 (1987), *aff'd in part, rev'd in part on other grounds, Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Having since abandoned "scarcity" as an argument in favor of indecency regulation, the FCC did not base its underlying decision here on *Red Lion*.

[15] Plainly, *Red Lion* referred to spectrum scarcity resulting from demand, 395 U.S. at 388-89 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate...[i]t would be strange if the First

has increased. Recently Congress and the FCC have focused energies on "reclaiming" TV spectrum by inducing broadcasters to turn in their licenses and moving the remaining stations to a smaller, contiguous portion of the TV band.[16] The freed-up spectrum would be auctioned off for broadband use. As discussion coalesces on a plan for "incentive auctions,"[17] broadcasters and wireless companies are engaged in a related fight over

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Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.").

[16] "Three bills have been introduced this year that would allow the Commission to spread the spectrum wealth around; reports of still more bills in the works continue to surface. (This is in addition to several bills introduced last year.)." Lee Petro, "Three Incentive Auction Bills Introduced in Congress," Comm. Daily Blog, Mar. 10, 2011, at http://www.commlawblog.com/2011/03/articles/broadcast/three-incentive-auction-bills-introduced-in-congress/
Most recently, a fourth bill was proposed. "Latta Bill Would Authorize Incentive Auctions, But Talks Continue, COMM. DAILY, Apr. 19, 2011, at http://www.capitolsolutions.com/CommDaily.4.19.11.pdf.

[17] FCC Chairman Genachowski Prepared Remarks at NAB Show 2011 ("Genachowski NAB Remarks"), Apr. 12, 2011, p. 5, at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0412/DOC-305708A1.pdf ("Authorized in 1993, spectrum auctions replaced an outdated system of comparative hearings and lotteries, letting the market determine spectrum allocation instead....FCC auctions have raised more than $50 billion in revenue for the Treasury....The reasons for voluntary incentive auctions are as compelling as for the original auctions. We need to free up more spectrum for mobile broadband, and there are no easy reallocations ahead of us...").

the special nature and value of broadcasting in the TV spectrum.[18] Among the recommendations in the National Broadband Plan are several with respect to spectrum, intended to address America's growing broadband spectrum needs.[19] In prepared comments before the National Association of Broadcasters this year, FCC Chairman Genachowski again stressed the "spectrum crunch":

> At last year's NAB, I spoke about how demand for spectrum was dramatically outstripping supply – driven by smartphones, which places a demand on spectrum that is 24 times as much as feature phones. The consensus projection at the time was that mobile data traffic would increase 35X over a 5-year period. Well, that was before tablets were introduced and took off at a faster pace than anybody projected. This year, analysts expect 55 million tablets to be sold, making it a $35 billion business.

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[18] Demand for radio spectrum also remains high. Pressure to create new low-power FM radio stations led to the recent enactment of the Local Radio Community Act of 2010, Pub. L. No. 111-371, 124 Stat. 4071 (2011). The statute requires the FCC to modify its rules to reduce the minimum distance separation requirements between low-power and full-service FM stations, FM translators and FM booster stations. It also gives the FCC discretion to grant waivers of other distance separation requirements under certain conditions.

[19] Connecting America: National Broadband Plan, Part I, Ch. 5 "Spectrum," pp. 73-105, at http://download.broadband.gov/plan/national-broadband-plan-chapter-5-spectrum.pdf.

> Already. And those tablets place a demand on spectrum that is 120 times that of old feature phones....This growing demand is not going away. The result is a spectrum crunch. No matter what happens in the marketplace, the only thing that can address the growing overall demand for mobile is increasing the overall supply of spectrum and the efficiency of its use....I believe the single most important step that will drive our mobile economy and address consumer frustration is authorizing voluntary incentive auctions."[20]

Most recently, Chairman Genachowski knocked down claims that a combined AT&T-T-Mobile entity could nullify the "spectrum crunch" for mobile broadband, noting "The math that drives the spectrum crunch is aggregate demand from all consumers in the U.S. compared to aggregate supply of spectrum." Jasmin Melvin, Reuters, "FCC head says mergers can't solve the spectrum crunch," Apr. 13, 2011, at http://www.msnbc.msn.com/id/42566661/ns/technology_and_science-wireless. No matter where the math driving a "spectrum crunch" and "incentive auctions" takes the TV spectrum, for now one thing is certain: there is no record on which this or any court can assess the complicated factual question of whether or not the supply of spectrum exceeds demand.

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[20] Genachowski NAB Remarks, at 4-5.

CONCLUSION

The petition for a writ of certiorari should be denied, but in any event this Court need not, and should not, question *Red Lion* or its prescient scarcity rationale, which are not explored in the opinions below and irrelevant to this case.

Respectfully submitted,

*ANDREW JAY SCHWARTZMAN
CHRYSTIANE B. PEREIRA
MEDIA ACCESS PROJECT
1625 K STREET, NW
SUITE 1000
WASHINGTON, DC 20006
(202) 232-4300

May 23, 2011

*Counsel of Record

OPPOSITION BRIEF

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v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

ELLEN S. AGRESS
MAUREEN A. O'CONNELL
FOX TELEVISION STATIONS, INC.
1211 Avenue of the Americas
New York, NY 10036
(212) 252-7204

CARTER G. PHILLIPS*
MARK D. SCHNEIDER
JAMES P. YOUNG
DAVID S. PETRON
RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondent Fox Television Stations, Inc.

* Counsel of Record

May 23, 2011

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

JONATHAN H. ANSCHELL
CBS BROADCASTING INC.
7800 Beverly Boulevard
Los Angeles, CA 90036
(323) 575-4781

SUSANNA M. LOWY
CBS BROADCASTING INC.
51 West 52nd Street
New York, NY 10019
(212) 975-3406

ROBERT CORN-REVERE
RONALD G. LONDON
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW Suite 800
Washington, D.C. 20006
(202) 973-4200

Counsel for Respondent CBS Broadcasting Inc.

SUSAN WEINER
NBC UNIVERSAL, INC.
30 Rockefeller Plaza
New York, NY 10112

MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents NBC Universal, Inc. and NBC Telemundo License Company

QUESTION PRESENTED

Whether the new, unrestrained indecency enforcement policy of the Federal Communications Commission (FCC) is unconstitutionally vague in violation of the First and Fifth Amendments or otherwise violates the First Amendment.

RULE 29.6 CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

Fox Television Stations, Inc. states that it is a wholly-owned subsidiary of News Corporation, a publicly-traded company. No entity holds 10 percent or more of News Corporation's stock.

CBS Broadcasting Inc. states that it is a wholly owned indirect subsidiary of CBS Corporation, which is a publicly traded corporation. CBS is aware that GAMCO Investors, Inc., a publicly-traded corporation, along with certain entities and persons affiliated therewith, filed a Schedule 13D with the Securities and Exchange Commission on March 15, 2011, which asserts ownership of 10.1% of CBS Corporation's Class A voting stock.

NBCUniversal Media, LLC was formerly known as NBC Universal, Inc. and is the indirect parent of NBC Telemundo License LLC, which itself was formerly known as NBC Telemundo License Co. NBCUniversal Media, LLC is a Delaware limited liability company and is indirectly owned 51% by Comcast Corporation and 49% by General Electric Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	4
A. The FCC's Initial Policy Of Indecency Enforcement	4
B. The FCC's New Indecency Enforcement Policy	8
C. The Preceding Decisions	11
REASONS FOR DENYING THE PETITION	15
I. CERTIORARI IS UNWARRANTED BECAUSE THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY COURT OF APPEALS	15
II. THE SECOND CIRCUIT'S DECISION DOES NOT PRECLUDE THE FCC FROM EFFECTIVELY IMPLEMENTING THE STATUTORY RESTRICTION ON BROADCAST INDECENCY	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES Page

Action for Children's Television v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988), *superseded in part by Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) ..... *passim*
Blum v. *Bacon*, 457 U.S. 132 (1982) 27
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 2, 11, 12, 27
FCC v. *Pacifica Found.*, 438 U.S. 726 (1978) ..... *passim*
Fox Television Stations, Inc. v. *FCC*, 489 F.3d 444 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009) 11
Holder v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010) 22, 23
Marks v. *United States*, 430 U.S. 188 (1977) 5
Nw. Airlines, Inc. v. *Cnty. of Kent*, 510 U.S. 355 (1994) 27
Payne v. *Tennessee*, 501 U.S. 808 (1991) 26
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 26
Reno v. *ACLU*, 521 U.S. 844 (1997) ..... *passim*
Sable Commc'ns of Cal., Inc. v. *FCC*, 492 U.S. 115 (1989) 5, 18
United States v. *Evergreen Media Corp. of Chi.*, 832 F. Supp. 1179 (N.D. Ill. 1993) 8
United States v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000) 26

STATUTES

Radio Act of 1927, ch. 169, 44 Stat. 1162 4
Communications Act of 1934, ch. 652, 48 Stat. 1064 4

TABLE OF AUTHORITIES—continued

	Page
Act of June 25, 1948, ch. 645, 62 Stat. 683 ..	4
Communications Act Amendments, Pub. L. No. 86-752, 74 Stat. 889 (1960)	4
Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006)	10
18 U.S.C. § 1464	4

AGENCY DECISIONS

AMFM Radio Licenses, L.L.C., 19 FCC Rcd. 5005 (2004)	9
Application of WGBH Educ. Found., 69 F.C.C.2d 1250 (1978)	6
Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y., 56 F.C.C.2d 94 (1975), *rev'd*, *Pacifica Found.* v. *FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978)	4, 5
Clear Channel Broad. Licenses, Inc., 19 FCC Rcd. 1768 (2004)	9
Clear Channel Broad. Licenses, Inc., 19 FCC Rcd. 6773 (2004)	9
Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. Of The Super Bowl XXXVII Halftime Show, 19 FCC Rcd. 19230 (2004), *aff'd*, 21 FCC Rcd. 2760 (2006).....	9
Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975 (2004)	9

TABLE OF AUTHORITIES—continued

Page

Complaints Against Various Licensees Regarding Their Broad. Of The Fox Television Network Program "Married By Am." On Apr. 7, 2003, 19 FCC Rcd. 20191 (2004) 9

Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 FCC Rcd. 2664 (2006) 2, 10, 11, 17

Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999 (2001) 8

Infinity Broad. Corp. Of Pa., 2 FCC Rcd. 2705 (1987), *overruled by Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004) 6

Pacifica Found., Inc., 2 FCC Rcd. 2698 (1987), *aff'd on recon., Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930 (1987) 6, 7, 22

Regents of the Univ. of Cal., 2 FCC Rcd. 2703 (1987) 6

WUHY-FM, E. Educ. Radio, 24 F.C.C.2d 408 (1970) 4

INTRODUCTION

The petition in this case is startling: while alleging that the Second Circuit's ruling conflicts with decisions of this Court and the D.C. Circuit, petitioners ignore altogether the controlling precedent at the core of the Second Circuit's holding. In *Reno* v. *ACLU*, 521 U.S. 844, 859 (1997), this Court struck down a prohibition on indecency that was substantively identical to the FCC's definition of "indecent" here, and the Second Circuit framed its entire vagueness analysis in this case around that holding. Pet. App. 19a-22a. The petition, remarkably, does not cite *Reno* even once, much less explain why it does not control the proper disposition of this case.

Petitioners' willful blindness to *Reno* may be understandable considering the serious dilemma it poses. On the one hand, petitioners are relying heavily in this Court on the fact that the FCC's bare definition of broadcast indecency is unchanged since *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 729 (1978), and *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*), *superseded in part by Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (*ACT III*). Pet. 19, 21. That historical continuity is the basis for petitioners' assertion that the Second Circuit's decision conflicts with those precedents. If the FCC's definition is all that matters, however, then *Reno*'s subsequent finding that an "almost identical" definition was unconstitutionally vague would be conclusive. Pet. App. 21a. "[L]anguage that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another." *Id.*

Of course, the FCC has supplemented the bare definition of indecency over the last decade with a set

of decisions that substantially changed and expanded its indecency policy, and indeed, this Court's prior ruling in this case was premised on the fact that the FCC's policy had changed. *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810, 1812 (2009). Although petitioners vigorously assert that this Court should not consider these FCC decisions, those enforcement adjudications—including the original order in this case—were issued, in part, for the express purpose of purporting to provide guidance to the broadcast industry concerning the scope of the FCC's new policy. See, *e.g.*, *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664, 2665, ¶¶ 1-3 (2006) (*Omnibus Order*); Pet. App. 23a. As the Second Circuit recognized, these enforcement actions "further elaborated on the definition of indecency in the broadcast context," and the Second Circuit recognized that even under *Reno* it had to consider whether this additional guidance dispelled the vagueness in the FCC's approach. Pet. App. 21a.

The FCC's "guidance" in these enforcement actions, however, leads directly to the other horn of petitioners' vagueness dilemma, because "[t]here is little rhyme or reason" to these decisions. Pet. App. 26a-27a. The FCC's new, more expansive prohibition on "indecency" has produced absurdly inconsistent and subjective decisions in which words and actions found to be unlawfully "offensive" in some instances are found to be non-actionable on others, producing "a standard that even the FCC cannot articulate or apply consistently." *Id.* at 27a.[1] Instead of dissipating

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[1] Petitioners complain that the Second Circuit relied on the FCC's inconsistent case outcomes instead of the supposed "guidance provided by the Commission's indecency definition."

the vagueness inherent in the new indecency standards, the FCC's additional enforcement guidance has only increased the chill on broadcast speech—as the numerous examples of self-censorship identified by the Second Circuit illustrate. *Id.* at 31a-34a.

Nor can petitioners find refuge in the *Pacifica* Court's acknowledgement that the FCC can consider "context." The Second Circuit explicitly recognized the FCC's authority to take context into account. Pet. App. 30a. The court reaffirmed, however, that if the FCC chooses to take a context-based approach to indecency enforcement, it must do so through binding, predictable, and foreseeable objective criteria that give broadcasters notice of what is prohibited and that preclude arbitrary enforcement. *Id.* As the Second Circuit correctly held, the First and Fifth Amendments prohibit the FCC's approach here, in which the invocation of "context" is not grounded in any "discernible standards" and, thus, leads to an unacceptable risk of "subjective, content-based decision-making." *Id.* at 29a-30a.

In short, the Second Circuit's decision does not conflict with any decision of this or any other Court. Petitioners' attempt to manufacture a conflict with pre-*Reno* decisions that evaluated a now superseded and restrained indecency enforcement regime, while refusing to grapple head-on with the vagueness identified by the Second Circuit in the FCC's inconsistent indecency decisions, is untenable. The Second Circuit's routine application of well-settled

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Pet. 27. But that position simply leads back to *Reno*'s holding that the definition itself is unconstitutionally vague.

vagueness principles does not warrant further review in this Court. The petition should be denied.

STATEMENT OF THE CASE

A. The FCC's Initial Policy Of Indecency Enforcement.

1. Congress has made it a crime to "utter[ ] any obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464.[2] For decades after the enactment of § 1464, the FCC enforced this prohibition only in the most extreme cases. See, *e.g.*, *WUHY-FM, E. Educ. Radio*, 24 F.C.C.2d 408, 409-10, 413, ¶¶ 3-6, 12 (1970). In 1960, Congress authorized the FCC to impose monetary forfeitures for violations of § 1464. Communications Act Amendments, Pub. L. No. 86-752, § 7, 74 Stat. 889, 894 (1960) (codified at 47 U.S.C. § 503(b)(1)). But the FCC did not exercise this authority to enforce § 1464's ban on "indecent," as opposed to "obscene," language until 1975.

At that time, the FCC addressed a complaint involving the radio broadcast—at 2:00 in the afternoon—of George Carlin's "Filthy Words" monologue. *Citizens Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94 (1975) (*Pacifica Order*). During the monologue, Carlin used the words "fuck" and "shit," "repeat[ing] them over and over again in a variety of colloquialisms," many of which vividly evoked sexual or excretory images. *Pacifica*, 438 U.S. at 729. In

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[2] Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1172-73 (original enactment); Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064, 1091; Act of June 25, 1948, ch. 645, § 1464, 62 Stat. 683, 769, 866 (transferring prohibition to U.S. Criminal Code).

ruling on the complaint, the FCC defined indecent speech as "language that describes, in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities and organs" and broadcast "at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica Order*, 56 F.C.C.2d at 98, ¶ 11. Under this definition, the Carlin broadcast was "indecent" and "could have been the subject of administrative sanctions" (although the FCC did not impose them). *Id.* at 99, ¶ 14.

On review of the order, this Court agreed with the FCC's position that "the repetitive, deliberate use of" certain "words that referred to excretory or sexual activities or organs . . . in an afternoon broadcast when children are in the audience" was indecent. *Pacifica*, 438 U.S. at 739, 741. Although a majority agreed that the monologue "was indecent within the meaning of § 1464," *id.* at 739, the Court fractured over the reasons why the FCC's action was constitutional under the First Amendment, *id.* at 729, 755, producing "an emphatically narrow holding," *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 127 (1989). Justices Powell and Blackmun, who supplied the crucial votes for *Pacifica*'s 5-4 majority,[3] indicated that the decision was limited to the "verbal shock treatment" caused by the repeated use of expletives in that broadcast. *Pacifica*, 438 U.S. at 757

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[3] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (omission omitted) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)).

(Powell, J., concurring). They explained that the FCC's "holding, and certainly the Court's holding . . . , does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61 (Powell, J., concurring); *accord id.* at 750 (opinion of the Court). They stressed that the FCC does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Id.* at 759-60 (Powell, J., concurring). Both Justices voted to uphold the FCC's order only because the FCC "may be expected to proceed cautiously, as it has in the past," and because this restraint diminishes any "undue 'chilling' effect on broadcasters' exercise of their rights." *Id.* at 762 n.4.

2. For almost 30 years following *Pacifica*, the FCC interpreted the term "indecent" to prohibit only egregious broadcasts like Carlin's monologue. See, *e.g.*, *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1251-52, 1254, ¶¶ 5-7, 10 (1978) ("We intend strictly to observe the narrowness of the *Pacifica* holding."). In 1987, the FCC adopted a broader definition of "indecent" to encompass more than the "seven dirty words" in Carlin's monologue while still only targeting speech that was functionally equivalent to the "verbal shock treatment" at issue in *Pacifica*.[4] The "deliberate and repetitive use" of certain language "in a patently offensive manner" remained "a requisite to a finding of indecency."

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[4] *Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699, ¶¶ 11-13 (1987), *aff'd on recon.*, *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930 (1987); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703, 2703-04, ¶ 5 (1987); *Infinity Broad. Corp. Of Pa.*, 2 FCC Rcd. 2705, 2705-06, ¶¶ 7-9 (1987).

Pacifica Found., Inc., 2 FCC Rcd. 2698, 2699, ¶ 13 (1987).

The D.C. Circuit upheld the FCC's revised enforcement standard against several challenges. *ACT I*, 852 F.2d 1332. Although broadcasters had challenged the FCC's definition of "indecency" as unconstitutionally vague, the court concluded that "[c]onsideration of petitioners' vagueness challenge . . . is not open to lower courts, in view of the Supreme Court's 1978 *Pacifica* decision." *Id.* at 1335. Acknowledging that the *Pacifica* "Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague," the D.C. Circuit "infer[red] from [the Court's] holding that the Court did not regard" the indecency definition as unconstitutionally vague. *Id.* at 1338-39. The court summarized: "if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction." *Id.* at 1339.

3. A decade after the D.C. Circuit's decision, this Court confronted a vagueness challenge to a prohibition substantively identical to the FCC's generic definition of indecency. In *Reno* v. *ACLU*, the Court affirmed the judgment that a prohibition on internet transmissions that "'depict[] or describe[], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs'" is unconstitutionally vague. 521 U.S. at 859, 860, 870, 874.

At roughly the same time, the FCC negotiated the dismissal of a broadcaster's lawsuit[5] challenging the constitutionality of § 1464, in part by agreeing to "'publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 and the FCC's enforcement policies with respect to broadcast indecency.'" *Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 8016 n.23 (2001) (*Indecency Policy Statement*). Although it took nearly seven years, the FCC ultimately issued that "interpretive guidance" in the *Indecency Policy Statement*, in which the FCC affirmed that "indecent" material must (1) depict or describe sexual or excretory organs or activities, and (2) be "patently offensive" as measured by contemporary community standards for the broadcast medium. *Id.* at 8002, ¶¶ 7-8 (emphasis omitted). The FCC also distilled from its decisions three principal factors that guide its "patently offensive" determination: (a) the explicitness or graphic nature of the material; (b) the extent to which the broadcast dwells on or repeats the offensive material; and (c) the extent to which the material appears to pander or is used to titillate or shock. *Id.* at 8003, ¶ 10. This policy statement also reaffirmed the FCC's restrained approach to indecency enforcement. *Id.* at 8001, ¶ 5.

B. The FCC's New Indecency Enforcement Policy.

In 2004, the FCC abandoned its previously restrained approach to indecency enforcement and assigned to itself the role of public censor of the good

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[5] *See United States* v. *Evergreen Media Corp. of Chi.*, 832 F. Supp. 1179, 1180 (N.D. Ill. 1993).

taste of broadcast television. Pet. App. 7a. First, the FCC changed its stance on the indecency of broadcasting a fleeting expletive, finding that the "Golden Globe Awards Show" was indecent. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4980, ¶ 12 (2004) (*Golden Globe Order*). At issue was a statement by the singer Bono that his receipt of an award was "'really, really fucking brilliant.'" *Id.* at 4976 n.4. The FCC concluded that the broadcast of Bono's statement fell within its definition of indecency, even though the expletive was fleeting and used as an intensifier, not a literal descriptor of sexual activities. *Id.* at 4978, ¶ 8.

Second, the FCC began imposing unprecedented fines for indecency violations. Pet. App. 8a. For the first time, the FCC applied the statutory penalty limit of $32,500 per violation to each network affiliate's broadcast of the same program.[6] This dramatically increased the aggregate fines that the FCC could (and did) impose on a single network

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[6] *See, e.g.*, *Complaints Against Various Licensees Regarding Their Broad. Of the Fox Television Network Program "Married By Am." on Apr. 7, 2003*, 19 FCC Rcd. 20191, 20191, 20195-96, ¶¶ 1, 14-16 (2004) ($1.2 million); *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. Of the Super Bowl XXXVII Halftime Show*, 19 FCC Rcd. 19230, 19237-40, ¶¶ 17-24 (2004) ($550,000), *aff'd*, 21 FCC Rcd. 2760 (2006); *Clear Channel Broad. Licenses, Inc.*, 19 FCC Rcd. 1768, 1777-79, ¶¶ 17-22 (2004) ($755,000); *Clear Channel Broad. Licenses, Inc.*, 19 FCC Rcd. 6773, 6780, ¶¶ 17-18 (2004) ($495,000); *AMFM Radio Licenses, L.L.C.*, 19 FCC Rcd. 5005, 5010-11, ¶ 14 (2004) ($247,500).

broadcast. *Id.* at 8a n.3 (noting fines for 2003 of $440,000 and fines for 2004 of $8 million).[7]

In response to the understandable uncertainty created by the FCC's sudden abandonment of its previously restrained enforcement approach, the FCC issued an *Omnibus Order* in February 2006 purportedly to provide guidance about its new indecency policy. *Omnibus Order*, 21 FCC Rcd. at 2665, ¶¶ 1-3. In it, the FCC ruled *inter alia* on the broadcasts at issue in this case, concluding that the live broadcasts of the 2002 and 2003 "Billboard Music Awards" by Fox Television Stations, Inc. (Fox) violated § 1464. In the 2002 broadcast, Cher had said that "'People have been telling me I'm on the way out every year, right? So fuck 'em.'" *Id.* at 2690, ¶ 101; Pet App. 88a. In the 2003 broadcast, presenter Nicole Richie had remarked: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Omnibus Order*, 21 FCC Rcd. at 2692-93, ¶ 112 & n.164; see also Pet. App. 9a, 44a. Citing the change in policy wrought in the *Golden Globe Order*, the FCC discounted the fact "'that specific words or phrases are not sustained or repeated'" and found both broadcasts actionably indecent, even though the expletives were unscripted. *Omnibus Order*, 21 FCC Rcd. at 2691, 2693, 2694, ¶¶ 104, 116, 118. The FCC also found that an interviewee's use of the word "bullshitter" on the CBS news program "The Early

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[7] Congress subsequently increased the statutory maximum tenfold. *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) (codified at 47 U.S.C. § 503(b)(2)(C)(ii)) (increasing maximum fine from $32,500 per occurrence to $325,000). This means that under the FCC's approach, the aggregate penalties for a network broadcast of a single expletive could exceed $65 million.

Show" was indecent under its new policy, in part because it was uttered on a news show. *Id.* at 2698-700, ¶¶ 137-145.

Fox and CBS petitioned for review of the FCC's order, and NBC intervened. The FCC then sought voluntary remand to address the broadcasters' arguments in the first instance. Pet. App. 10a, 41a. On remand, the FCC reaffirmed its indecency findings against the "Billboard Music Awards" broadcasts. *Id.* at 10a, 70a, 95a. It reversed the indecency finding regarding "The Early Show," however, *because* the expletive was used in a "'*bona fide* news interview.'" *Id.* at 100a-101a.

C. The Preceding Decisions.

1. The broadcast networks petitioned the Second Circuit for review of both FCC orders, raising Administrative Procedure Act (APA), statutory, and constitutional challenges. Pet. App. 11a. The court in a divided 2-1 decision granted the petition on APA grounds, concluding that the FCC had not adequately justified the change in its indecency enforcement policy. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 446-47 (2d Cir. 2007). In dicta, the court questioned whether any explanation for the FCC's change in policy "would pass constitutional muster," *id.* at 462, describing the FCC's test for actionable indecency as "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague," *id.* at 463.

2. This Court by a narrow 5-4 majority reversed the Second Circuit's APA determination. It held that, contrary to the Second Circuit's reasoning, the APA does not impose a heightened requirement on agencies when they make a policy change. *Fox*, 129 S. Ct. at 1810-11. Judged under typical APA

principles, the FCC's "new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious." *Id.* at 1812. The majority expressly "decline[d] to address the constitutional questions" raised by the broadcasters and remanded. *Id.* at 1819.

3. On remand, the Second Circuit unanimously ruled that the FCC's new indecency enforcement policy is unconstitutional. While the court discussed several of the broadcasters' First Amendment challenges, Pet. App. 15a-18a, it ultimately struck down the FCC's new policy as unconstitutionally vague, *id.* at 2a, 18a.

At the outset, the Second Circuit rejected the FCC's arguments that this Court's decisions in *Pacifica* or *Reno* foreclosed the broadcasters' vagueness challenge. The court explained that *Pacifica* "did not reach the question of whether the FCC's policy was unconstitutionally vague." Pet. App. 22a. Moreover, *Pacifica* "was an intentionally narrow opinion predicated on the FCC's 'restrained' enforcement policy," and the Second Circuit "would be hard pressed to characterize" the new policy "as 'restrained.'" *Id.* As for *Reno*, the court explained that it did nothing to foreclose the broadcaster's vagueness challenge. *Id.* at 21a. To the contrary, *Reno* struck down a "definition of indecency [that] was almost identical to the [FCC's]." *Id.* Because the FCC has "further elaborated" on its indecency standard in various orders, however, the Second Circuit examined whether "[t]his additional guidance [is] sufficient to survive a vagueness challenge." *Id.* The court concluded that it was not.

Applying well-established law, the Second Circuit concluded that the FCC's new policy is not "clearly defined" so that a reasonable broadcaster would

"know what is prohibited." Pet. 18a (internal quotation marks omitted) (relying on cases citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). It explained that the FCC's "three-factor 'patently offensive' test" failed to give broadcasters fair notice of what the FCC will find indecent because, in applying those factors, the FCC has provided no reasoning to illuminate their application while reaching inconsistent decisions about the indecency of broadcasts involving expletives. *Id.* at 24a; *id.* at 26a-29a (illustrating contradictory FCC rulings); *id.* at 32a-33a (demonstrating inconsistent application of FCC's exceptions to indecency standard). "This hardly gives broadcasters notice of how the [FCC] will apply the factors in the future." *Id.* at 24a. Indeed, the FCC's policy has "result[ed] in a standard that even the FCC cannot articulate or apply consistently." *Id.* at 27a.

The Second Circuit also explained that "there is ample evidence in the record that the FCC's indecency policy has chilled protected speech." Pet. App. 31a. The court showed that, because of the FCC's vague policy, broadcasters had declined to air documentaries, book readings containing adult language, and numerous live broadcasts. *Id.* at 31a-32a. This "chilling effect," according to the court, "extends to news and public affairs programming as well." *Id.* Indeed, the chill "extended to programs that contain no expletives, but which contain reference to or discussion of sex, sexual organs, or excretion." *Id.* at 33a. Ultimately, the court concluded that "the absence of reliable guidance" by the FCC "chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature." *Id.* at 34a.

4. Shortly after the Second Circuit denied petitioners' rehearing en banc petition in *Fox* v. *FCC*, the court decided another petition for review of an indecency complaint decided under the FCC's new, expanded indecency enforcement regime. At issue was ABC Television Network's 2003 broadcast of an episode of the award-winning program *NYPD Blue*. Pet. App. 120a. In that episode, "an adult woman's nude buttocks" were depicted "for slightly less than seven seconds" in a scene that was intended "to portray the awkwardness between a child and his parent's new romantic partner and their difficulties in adjusting to life together." *Id.* at 120a-21a. The FCC found the "depiction of the buttocks was indecent" and fined "each of forty-four ABC-affiliated stations" for airing the episode. *Id.* at 122a.

In ruling on a vagueness challenge to the FCC's order, the Second Circuit noted that in *Fox* v. *FCC* it had recently "struck down the FCC's indecency policy, holding that it violates the First Amendment because it is unconstitutionally vague." Pet. App. 123a. According to the court, the FCC and United States "concede[d]" that *Fox* v. *FCC* controlled that case, and the court therefore held that "*Fox*'s determination that the FCC's indecency policy is unconstitutionally vague binds this panel." *Id.* at 124a.

Petitioners simultaneously seek certiorari in *Fox* v. *FCC* and *FCC* v. *ABC, Inc.*[8]

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[8] *See* Pet. 31 n.4. Fox, CBS, and NBC join the Brief in Opposition filed by ABC with respect to petitioners' request for certiorari in *FCC* v. *ABC, Inc.*

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS UNWARRANTED BECAUSE THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY COURT OF APPEALS.

The Court should deny the petition because there is no conflict between the Second Circuit's vagueness decision below and the decisions of this Court or any court of appeals.

a. The Second Circuit applied well-established law to conclude that the FCC's new indecency policy is unconstitutionally vague. The court recognized first that, in *Reno*, this Court concluded that a definition of indecency "almost identical" to the FCC's generic definition was unconstitutionally vague. Pet. App. 21a ("[L]anguage that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another."). Thus, the only question for the court was whether the FCC's "further elaborat[ion]" of that definition under its new indecency policy (in the form of guidance and orders), *id.*, has provided broadcasters with "'a reasonable opportunity to know what is prohibited,'" *id.* at 18a.

The court concluded correctly that the FCC's further elaboration "hardly gives broadcasters notice" of what is prohibited under the new policy, Pet. App. 24a, and has "result[ed] in a standard that even the FCC cannot articulate or apply consistently," *id.* at 27a. The FCC has adopted a presumption that all instances of certain expletives are indecent, unless some exception for "*bona fide* news" or artistic use applies. But there is no way for broadcasters to know whether the FCC will agree that a particular broadcast constitutes *bona fide* news or that some

expletive is artistically integral to a particular program. *Id.* at 26a-27a. Even the FCC cannot predict how these exceptions will apply in practice. In the *Omnibus Order*, for example, the FCC first found the broadcast of the word "bullshitter" on CBS's "The Early Show" was "'shocking and gratuitous'" and thus indecent because the program was a news show, only to later reverse itself, concluding that the broadcast was not indecent *because* it was "'bona fide news.'" *Id.* at 27a-28a. "In other words, the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason . . . ." *Id.* at 28a.

The court also demonstrated that the FCC had issued numerous other inconsistent orders under its new policy, without any reasoning that explained how the FCC applies its indecency factors. Pet. App. 24a, 26a, 27a-28a. The FCC's inconsistent determinations and failure to provide discernible standards led the Second Circuit to conclude—quite rightly—that the new indecency policy fails to give broadcasters "some degree of certainty what the policy is so that they can comply with it." *Id.* at 25a. These problems also raised grave concerns that the FCC's new indecency policy has led to the "subjective, content-based decision-making" that the First Amendment forbids. *Id.* at 29a; see also *id.* at 28a (discussing *Grayned*, 408 U.S. at 108-09, and *Forsyth Cnty., Ga.* v. *Nationalist Movement*, 505 U.S. 123, 130 (1992)).

In defending the FCC's policy, petitioners fault the Second Circuit for looking at the FCC's "inconsistent outcomes" and not merely the "guidance provided by the [FCC's] indecency definition." Pet. 27. But the FCC issued many of these decisions expressly purporting to give broadcasters guidance on the FCC's new, expanded indecency policy. See, *e.g.*,

Omnibus Order, 21 FCC Rcd. at 2665, ¶ 2 ("The cases we resolve today represent a broad range of factual patterns. Taken both individually and as a whole, we believe that they will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard."). In other words, the FCC made clear that these decisions are an integral part of the FCC's policy. In any event, this additional guidance is the only ground to avoid the force of *Reno*'s vagueness analysis on the FCC's basic indecency definition.

The Second Circuit further showed that the FCC's indiscernible standard chills vast amounts of protected speech. Pet. App. 31a-34a. The court explained that broadcasters had declined to air various programs due to the FCC's vague policy, including a Peabody Award-winning documentary that contained real audio footage of firefighters in the World Trade Center on September 11th and readings from literary works involving adult language. *Id.* at 31a. Broadcasters have also, among other things, stopped airing certain live broadcasts and have even refused to air political debates because one of the local politicians had previously used expletives in public statements. *Id.* at 32a-33a. The chill, according to the court, also extended to programming containing no expletives but involving important subjects such as sexual health issues. *Id.* at 33a-34a.

The Second Circuit simply applied existing vagueness principles to the circumstances created by the FCC's new indecency policy. It did not purport to establish a new legal principle or standard. Rather, it correctly concluded only that the FCC's policy fails to let broadcasters "'know what is prohibited.'" Pet. App. 18a (relying on cases quoting *Grayned*, 408 U.S.

at 108). This is not a legal issue that warrants this Court's review.

b. Petitioners assert that this Court's review is justified because the decision below conflicts with this Court's decision in *Pacifica*. Pet. 17. But there is no conflict between *Pacifica* and the decision below, because *Pacifica* "did not reach the question of whether the FCC's policy was unconstitutionally vague." Pet. App. 22a; *ACT I*, 852 F.2d at 1338. There can be no conflict between the Second Circuit's vagueness decision and a precedent that has no vagueness holding.

Petitioners nonetheless suggest a holding on vagueness is implicit in the *Pacifica* opinion because the Court "did not suggest" that the FCC's "context-based approach" was vague, and because the Court did not "suggest" that the FCC's definition of indecency was "unconstitutionally imprecise." Pet. 19. But this Court does not decide fundamental questions of constitutional law by silence. Petitioners ignore the fact that *Pacifica* produced "an emphatically narrow holding." *Sable*, 492 U.S. at 127. The *Pacifica* Court warned at the outset of the decision that it was following the "settled practice [of] avoid[ing] the unnecessary decision of . . . issues" and was limiting its review to the FCC's "determination that the Carlin monologue was indecent as broadcast." *Pacifica*, 438 U.S. at 734-35. Moreover, the Court reaffirmed the "narrowness of [its] holding" in concluding only that the specific context of the Carlin broadcast at issue justified the FCC's intrusion on broadcasters' First Amendment rights. *Id.* at 750-51. Indeed, Justices Powell and Blackmun—who supplied the critical votes for affirmance—agreed only "that on the facts of this case, the [FCC's] order did not violate

respondent's First Amendment rights." *Id.* at 761 (Powell, J., concurring).

Moreover, petitioners' arguments concerning what the *Pacifica* Court may have thought about the precision of the FCC's definition of indecency are flatly at odds with this Court's holding in *Reno* v. *ACLU*. There, this Court agreed that a prohibition substantively identical to the FCC's definition of indecency is unconstitutionally vague. 521 U.S. at 860, 870, 874. Despite the Second Circuit's recognition of *Reno*'s importance to the vagueness inquiry here, Pet. App. 21a, petitioners wholly ignore *Reno*, failing to cite or even mention it a single time in their petition.[9]

Petitioners nonetheless claim that the decision below conflicts with *Pacifica*'s recognition of the importance of "context" in regulating indecency. Pet. 17, 18-19. The Second Circuit expressly recognized, however, that "context is always relevant" and did not "suggest otherwise in [its] opinion." Pet. App. 30a. But as the court explained, "[i]t does not follow that the FCC can justify any decision to sanction indecent speech by citing 'context.'" *Id.* The "FCC still must

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[9] Petitioners will likely attempt to avoid the force of *Reno*, as they did in the Second Circuit, by claiming that *Reno* itself distinguished *Pacifica* and the broadcast context when evaluating the vagueness of an indecency definition. *See Reno* v. *ACLU*, 521 U.S. at 866-67. In fact, *Reno* distinguished *Pacifica* for the limited purpose of determining the "'level of First Amendment scrutiny that should be applied to [the internet],' not to its analysis of whether the statute was unconstitutionally vague." Pet. App. 21a (quoting *Reno* v. *ACLU*, 521 U.S. at 870). *Reno*'s discussion of *Pacifica* had no bearing on the Court's vagueness analysis—nor could it, as *Pacifica* itself had no vagueness discussion that could be even possibly relevant to that issue.

have discernible standards by which individual contexts are judged." *Id.*[10] *Pacifica* is not to the contrary. Nothing in *Pacifica* suggested that by considering "context," the FCC could shirk the responsibility of providing some set of binding, predictable, and foreseeable objective criteria that provide the needed notice to the regulated community and preclude arbitrary enforcement by the FCC. The Second Circuit merely recognized that the FCC's invocation of "context" to justify its contradictory and inconsistent indecency decisions acted as a subterfuge for the "subjective, content-based decision-making" prohibited by the First Amendment. *Id.* at 29a-30a.

Moreover, petitioners fail to appreciate the ramifications of abandoning the restrained enforcement policy that the FCC followed in *Pacifica* and thereafter. The FCC no longer confines its indecency sanctions to the limited class of cases approaching the "verbal shock treatment" at issue in *Pacifica*, and it now asserts the authority to impose unprecedented fines for the broadcast of a single, unintentional and fleeting expletive. See Pet. App. 7a-8a & n.3. Yet, as the Second Circuit recognized, the FCC has not provided any discernible standard by which broadcasters can judge when the FCC might impose these massive fines, resulting in the chilling

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[10] Petitioner's suggestion that the FCC's *Indecency Policy Statement* provides discernible standards is amply refuted by the Second Circuit's decision, which found that the FCC cannot apply it consistently or with any reasoned basis. Nor was it incumbent on the Second Circuit to offer a "'tighter' definition of indecency." Pet. 21. The court did not need to usurp the FCC's regulatory authority in order to determine whether the FCC's policy is unconstitutionally vague.

of vast amounts of speech. *Pacifica*'s explicitly "narrow" decision did not purport to sanction a "context-based approach" that is detached from any predictable criteria.

Petitioners claim that "the court of appeals' vagueness analysis is largely untethered to" the FCC's change in policy. Pet. 20. Not so. The court recognized, as Justice Powell did in *Pacifica*, that a cautious approach to indecency enforcement would avoid "an undue 'chilling' effect on broadcasters' exercise of their rights." *Pacifica*, 438 U.S. at 762 n.4 (Powell, J., concurring). The abandonment of that restraint has greatly magnified the chilling effects of the indecency regime's vagueness.

c. Similarly, the decision below does not conflict with the D.C. Circuit's *ACT* decisions, as petitioners contend, Pet. 21. *ACT I* acknowledged that the *Pacifica* Court "did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague," but it nonetheless "infer[red]" that the policy was not vague while "welcom[ing] correction" from "Higher Authority." *ACT I*, 852 F.2d at 1338-39. Since then, this Court has provided that "correction," holding that an indecency definition identical to the FCC's generic definition of indecency is unconstitutionally vague. *Reno* v. *ACLU*, 521 U.S. at 870-74. *Reno* thus undermines *ACT I* on the vagueness question and trumps any possible conflict between that decision and the one below.

In addition, there is no conflict with *ACT I* because the court in that case was considering whether the FCC's prior, more restrained indecency enforcement policy was vague. In *ACT I*, the D.C. Circuit considered the vagueness question through the prism of *Pacifica*, which did "not speak to cases involving the isolated use of a potentially offensive word in the

course of a radio broadcast, as distinguished from the verbal shock treatment" at issue there. *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring); see *id.* at 750 ("We have not decided that an occasional expletive . . . would justify any sanction . . . ."). Indeed, "a requisite to a finding of indecency" under the policy at issue in *ACT I* was still the "deliberate and repetitive use" of certain language "in a patently offensive manner." *Pacifica Found., Inc.*, 2 FCC Rcd. at 2699, ¶ 13. And in both cases, the FCC had indicated that it would proceed with restraint, diminishing the potential chill on broadcasters' speech. *Pacifica*, 438 U.S. at 762 n.4; *ACT I*, 852 F.2d at 1340 n.14.

The FCC's new expansive policy is not similarly restrained. The FCC now claims the authority to impose exorbitant sanctions on broadcasters for the broadcast of a single fleeting expletive. The FCC also claims for itself the authority to judge whether a particular scene or use of language is necessary in a particular broadcast, see, *e.g.*, Pet. App. 227a-228a, despite *Pacifica*'s rejection of such close supervision of content, *Pacifica*, 438 U.S. at 761 (Powell, J., concurring). Yet, it has provided no discernible guidance for broadcasters to predict when they might be punished, which, as the Second Circuit explained, has chilled vast amounts of speech. Pet. App. 31a-34a.

d. Finally, petitioners claim that the decision below conflicts with this Court's decision in *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010). Pet. 22-23. The Second Circuit considered petitioners' quotation of "certain language" from that decision but rightly concluded that the decision was "inapposite to the issues before" it. Pet. App. 30a n.9. Petitioners rely on snippets from the Court's decision in

Humanitarian Law Project about evaluating vagueness claims "on 'the particular facts at issue'" and about plaintiffs being unable to "'complain of the vagueness of the law as applied to the conduct of others'" when their conduct is clearly proscribed. Pet. 23. But petitioners cannot divorce these statements from the fundamental flaw that the *Humanitarian Law Project* Court identified in the lower court's decision. In that case, the lower court had erred in its vagueness analysis by "incorporat[ing] elements of First Amendment overbreadth doctrine." *Humanitarian Law Project*, 130 S. Ct. at 2719. That is, the lower court had evaluated the vagueness of the statutory terms at issue by "deciding how the statute applied in hypothetical circumstances" and concluding that the broad sweep of the language in those circumstances rendered the statute vague. *Id.* The Court explained that, unlike terms such as "indecent," which required "wholly subjective judgments," the statutory terms at issue clearly proscribed the conduct at issue and could not be rendered vague by their hypothetical application elsewhere. *Id.* at 2720. Indeed, the lower court's analysis was all the more problematic because the statute implicated national-security concerns, an area in which "Congress and the Executive are uniquely positioned to make principled distinctions," unlike the wholly distinct context in which "the statute turned on the offensiveness of the speech at issue" and "'governmental officials cannot make principled distinctions.'" *Id.* at 2728 (quoting *Cohen* v. *California*, 403 U.S. 15, 25 (1971)).

The flawed reasoning identified in *Humanitarian Law Project* appears nowhere in the Second Circuit's vagueness analysis. The court below did not decide whether "indecency" in § 1464 or even the FCC's definition of that term are vague by reference to

hypothetical scenarios not before the court. Rather, the court accepted the *Reno* Court's determination that the term "indecent" and a proscription "almost identical" to the FCC's generic definition of indecency are unconstitutionally vague. Pet. App. 21a. The only question for the court was whether the actual "further elaborat[ion]" by the FCC—including in the original order under review in this case—provided sufficient notice of what the FCC's new policy prohibits.[11] *Id.* In other words, the court reviewed the FCC's orders and rulings, including the FCC's flip-flop on CBS's "The Early Show" in the proceedings below, to determine what the terms of the policy are, and it concluded that the FCC's "further elaborat[ion]" had "result[ed] in a standard that even the FCC cannot articulate or apply consistently." *Id.* at 27a. Petitioners' quotations from *Humanitarian Law Project* are indeed "inapposite" here.

In any event, petitioners are wrong that if the Second Circuit had "applied" the FCC's indecency policy "to the fact of the actual broadcasts," "it would have rejected the vagueness challenges." Pet. 23. There is no way for Fox to know, for example, whether the live broadcast of an awards show is sufficiently newsworthy to qualify for the FCC's "*bona fide* news exception." After all, perhaps the most newsworthy broadcasts involve live coverage of live events. Moreover, the application of the indecency standard to programming like the "Billboard Music Awards" is especially unclear when even the FCC itself cannot seem to determine whether an expletive is more or less shocking because

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[11] The FCC issued many of those decisions and rulings expressly to provide guidance to broadcasters on what its indecency policy was. *See supra* at 2, 16-17.

it aired during a news program. Pet. App. 27a-28a. This uncertainty in the FCC's indecency policy opens the door to exactly the kind of subjective decision-making that the vagueness doctrine is intended to avoid. *Id.* at 28a. "[E]ven the risk of such subjective, content-based decision-making raises grave concerns under the First Amendment." *Id.* at 29a.

II. THE SECOND CIRCUIT'S DECISION DOES NOT PRECLUDE THE FCC FROM EFFECTIVELY IMPLEMENTING THE STATUTORY RESTRICTION ON BROADCAST INDECENCY.

Contrary to petitioners' claim, the Second Circuit's decision does not "preclude" the FCC "from effectively implementing statutory restrictions on broadcast indecency." Pet. 31. As petitioners acknowledge (at 29), the Second Circuit did "not suggest that the FCC could not create a constitutional policy." Pet. App. 34a. Indeed, the court did not purport to overturn *Pacifica*—under which the FCC has regulated indecent broadcasts for 30 years—or § 1464. Rather, the court struck down the FCC's new, expanded indecency enforcement policy, concluding that "[t]he First Amendment requires nothing less" than "some degree of certainty [about] what the [indecency] policy is." *Id.* at 25a. The Second Circuit's decision does not prohibit the FCC from regulating indecency by devising some other flexible approach that will meet its regulatory objectives, especially in light of the restraint shown by broadcasters in declining to air potentially offensive material even during the safe harbor period of 10 p.m. to 6 a.m. *Id.* at 60a (citing networks' policies against offensive language during all parts of the day).

Articulating some reasonably clear indecency standard may well be challenging. But that is a

necessary incident of the government's attempt to regulate the content of speech under the First Amendment. See *Reno* v. *ACLU*, 521 U.S. at 874 ("'expression which is indecent but not obscene is protected by the First Amendment.'" (quoting *Sable*, 492 U.S. at 126)); *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 827 (2000) (any regulation of indecency must be accomplished "in a way consistent with First Amendment principles"). It is not a burden that this Court can or should lift from the FCC's shoulders.

* * * *

In the event that this Court decides to grant the petition, the broadcast networks believe that it is important to highlight the other significant issues that will arise in addition to the vagueness question raised by petitioners. Before the Second Circuit, Fox and other broadcasters brought a number of challenges to the FCC's indecency regime, including a constitutional challenge to the FCC's very authority under *Pacifica* and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). See Pet. App. 15a. As Fox explained, the media landscape has changed so dramatically that the factual underpinnings of those decisions are no longer valid. See *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Fox and other broadcasters explained that technological changes and the proliferation of numerous other media sources no longer justify diminished scrutiny of the FCC's attempts to regulate the content of broadcast television. The Second Circuit recognized the significance of the dramatic changes in the media marketplace but felt "bound by Supreme Court precedent," leaving it to this Court to "decide in due course to overrule *Pacifica* and subject speech

restrictions in the broadcast context to strict scrutiny." Pet. App. 15a-17a.

If the Court grants certiorari to review the vagueness question, the broadcast networks intend to argue the obsolescence of *Pacifica* and *Red Lion*, as well as other, alternative bases for affirming the Second Circuit's judgment. *Nw. Airlines, Inc.* v. *Cnty. of Kent*, 510 U.S. 355, 364 (1994); see also *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982). By seeking review of the Second Circuit's constitutional holding, petitioners have necessarily put at issue the underlying constitutionality of regulating broadcast speech and whether the Court's decisions in *Pacifica* and *Red Lion* should be overruled. Indeed, members of this Court have already acknowledged the "long shadow" that these issues cast over this case. *Fox*, 129 S. Ct. at 1828-29 (Ginsburg, J., dissenting); *id.* at 1819-22 (Thomas, J., concurring). This Court is the only court that can resolve those fundamental questions, Pet. App. 17a, and given the persistent chill on broadcasters' speech from the FCC's current indecency regime, the First Amendment values at stake here should prompt the Court to bring finality to this litigation—whether on vagueness grounds or otherwise—if it grants certiorari in this case.

Nevertheless, because the Second Circuit's limited vagueness holding itself raises no issues worthy of this Court's review, and petitioners' claims to the contrary are mistaken, the Court should deny the petition.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully yours,

ELLEN S. AGRESS
MAUREEN A. O'CONNELL
FOX TELEVISION STATIONS, INC.
1211 Avenue of the Americas
New York, NY 10036
(212) 252-7204

CARTER G. PHILLIPS*
MARK D. SCHNEIDER
JAMES P. YOUNG
DAVID S. PETRON
RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondent Fox Television Stations, Inc.

JONATHAN H. ANSCHELL
CBS BROADCASTING INC.
7800 Beverly Boulevard
Los Angeles, CA 90036
(323) 575-4781

SUSANNA M. LOWY
CBS BROADCASTING INC.
51 West 52nd Street
New York, NY 10019
(212) 975-3406

ROBERT CORN-REVERE
RONALD G. LONDON
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W. Suite 800
Washington, D.C. 20006
(202) 973-4200

Counsel for Respondent CBS Broadcasting Inc.

SUSAN WEINER
NBC UNIVERSAL, INC.
30 Rockefeller Plaza
New York, NY 10112

MIGUEL A. ESTRADA
GIBSON, DUNN &
CRUTCHER LLP
1050 Connecticut
Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents NBC Universal, Inc. and NBC Telemundo License Company

May 23, 2011

* Counsel of Record

REPLY BRIEF

No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Cases: Page

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CBS, Inc. v. *FCC*, 453 U.S. 367 (1981) 11
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FCC v. *Pacifica Found.*, 438 U.S. 726 (1978) 2, 6, 9
Holder v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010) 2
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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

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ABC, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

In a case involving expletives (*Fox*), the Second Circuit "str[uck] down the FCC's indecency policy" in its entirety on the ground that the policy was facially vague. Pet. App. 34a. In a second case involving scripted adult nudity (*ABC*), the court of appeals confirmed the breadth of its prior decision by overturning the Commission's order on the ground that *Fox* "binds this panel." *Id.* at 124a. The court of appeals' holding that the FCC's "indecency policy" is unconstitutionally vague

in its entirety conflicts with the D.C. Circuit's recognition that, in light of this Court's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*), such a "vagueness challenge * * * is not open to lower courts." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1335 (1988) (*ACT I*) (R.B. Ginsburg, J.). The court of appeals also erred by facially invalidating the FCC's indecency policy based on perceived inconsistencies between adjudications not before the court, without inquiring whether the Commission's policy was vague as applied to the particular broadcasts at issue. See *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (*HLP*). The Second Circuit's decisions effectively disable the Commission from enforcing the prohibition on broadcast indecency that has existed since the early years of broadcast communications. This Court's review is warranted.

1. In *Pacifica*, this Court rejected a constitutional challenge to an FCC indecency finding. The Court observed with approval that, under the FCC's approach to resolving issues of broadcast indecency, "context is all-important." 438 U.S. at 750. The Court also found "no basis for disagreeing with the Commission's conclusion that indecent language was used in [the] broadcast" before it, *id.* at 741, a holding irreconcilable with the view that the Commission's standard for determining indecency was unconstitutionally vague. Although the FCC has since expanded its indecency policy to cover isolated offensive words and images where circumstances warrant, it has adhered since *Pacifica* to the view that the presence or absence of indecency turns in part on the context in which particular words or images appear. See *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009) (*Fox*) (explaining that "the Commission's

decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica*"). The D.C. Circuit has repeatedly recognized that *Pacifica* forecloses any vagueness challenge to the FCC's indecency policy. See *Act I*, 852 F.2d at 1337-1338; *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (*ACT II*), cert. denied, 503 U.S. 913, 914 (1992); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc) (*ACT III*), cert. denied, 516 U.S. 1043 (1996).

Fox contends that this Court's decision in *Reno* v. *ACLU*, 521 U.S. 844 (1997), which held that the Communications Decency Act's regulation of indecent expression on the Internet was unconstitutionally vague, "trumps any possible conflict." Fox Br. in Opp. 21; see ABC Br. in Opp. 9-10. Fox professes to find it "startling" and "remarkabl[e]" that the government did not discuss *Reno* in its petition for certiorari because, according to Fox, that decision was "at the core of the Second Circuit's holding." Fox Br. in Opp. 1.

In *Fox*, however, the Second Circuit "*reject[ed]* the Networks' argument that *Reno* requires us to find the FCC's policy vague." Pet. App. 21a (emphasis added). The court explained that "[u]nlike in *Reno*," where no federal agency was charged with administering the challenged statute or clarifying the scope of the relevant indecency prohibition, "the FCC has further elaborated on the definition of indecency in the broadcast context," both in *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 (2001) (*Industry Guidance*), and in its reported decisions. Pet. App. 21a. Such agency interpretations

(many of which are subject to review for internal consistency under the Administrative Procedure Act) can clarify an otherwise vague statutory standard. See *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 575 (1973). As the court of appeals correctly concluded in *Fox*, "[t]his additional guidance * * * certainly distinguishes the FCC policy from the one struck down in *Reno*." Pet. App. 21a.

Respondents are also wrong in contending that the statutory provision at issue in *Reno* was "substantively identical to the FCC's definition of 'indecent' here." Fox Br. in Opp. 1. One of the prohibitions struck down in *Reno* applied to "indecent" communications without "any textual embellishment at all." 521 U.S. at 871 n.35. The other prohibition covered all Internet content that was "patently offensive as measured by contemporary community standards." *Id.* at 860. Given the relatively new and dynamic nature of the Internet when *Reno* was decided, it would have been difficult to identify "community standards" or "traditional program content" with respect to that medium. Cf. *Reno*, 521 U.S. at 867; see *id.* at 868-869 ("Neither before nor after the enactment of the [Communications Decency Act] have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.").

By contrast, the Commission has long experience examining "contemporary community standards *for the broadcast medium*," and it has identified for broadcasters three "principal factors" that are "significant" to its determination whether material is patently offensive. *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8 (emphasis added). The Court in *Reno* noted that the Commission has "been regulating radio stations for decades," and

that in *Pacifica* the Commission had "targeted a specific broadcast that represented a rather dramatic departure from traditional program content." 521 U.S. at 867. Unlike the Internet communications at issue in *Reno*, broadcast media are subject to longstanding and well-established community standards. Indeed, the major networks have personnel and policies designed to ensure compliance with those standards, even in time periods when FCC regulations do not apply. Pet. App. 60a-61a.

Fox also contends (Br. in Opp. 21-22) that the D.C. Circuit in the *ACT* cases approved only "the FCC's prior, more restrained indecency enforcement policy," which was limited to "the 'deliberate and repetitive use' of" offensive language. The court in the *ACT* cases, however, was reviewing the FCC's decision to *move away* from its post-*Pacifica* indecency policy that had proscribed only such material. See Pet. 4-6. The D.C. Circuit in the *ACT* cases reviewed three decisions of the Commission, "each of which declared 'indecent' material which would not have been so identified under the prior FCC standard." *ACT I*, 852 F.2d at 1336. The court explained that the Commission had decided to "measure[] broadcast material against the generic definition of indecency" because its previous "deliberately-repeated-use-of-dirty-words policy" was "'unduly narrow as a matter of law' and inconsistent with [the agency's] obligation responsibly to enforce" the prohibition on indecent broadcasting. *Id.* at 1337-1338. It was that broader indecency policy that the D.C. Circuit upheld against a vagueness challenge. *Id.* at 1338-1339.

2. The Second Circuit also disregarded this Court's admonition in *HLP* that courts must evaluate vagueness challenges based on the facts of the case before them, rather than on other applications not before the court.

Notwithstanding that directive, the court of appeals failed entirely to ask whether Fox or ABC had received adequate notice that the particular broadcasts at issue here would be considered indecent. Instead, the court conducted a compare-and-contrast exercise limited to other FCC orders involving different broadcasts. See Pet. 24. Respondents adopt the court of appeals' flawed methodology by alleging inconsistencies between other FCC adjudications involving programs unlike those at issue here. See Fox Br. in Opp. 17; ABC Br. in Opp. 11-13; ABC Affiliates Br. in Opp. 18-20 n.20.

Fox (Br. in Opp. 15-16) and ABC (Br. in Opp. 10-11) contend that the Commission's elaboration of its indecency policy through its policy statement and decisions have rendered enforcement less certain. But it should come as no surprise that, under a contextual analysis, "words and actions found to be unlawfully 'offensive' in some instances" will be "found to be non-actionable [in] others." Fox Br. in Opp. 2. This Court observed in *Pacifica* that "a prime-time recitation of Geoffrey Chaucer's Miller's Tale" need not be equated for indecency purposes with the George Carlin "Filthy Words" monologue, even if both include offensive language. 438 U.S. at 750 & n.29.

In any event, respondents do not show how purported inconsistencies between other FCC rulings deprived them of notice that the particular broadcasts at issue here might be considered indecent. For example, Fox does not identify any case in which the Commission has found that the concededly gratuitous use of the F-word in a prime-time awards show was not indecent. Fox asserts (Br. in Opp. 24) that there was "no way" for it to have known "whether the live broadcast of an awards show is sufficiently newsworthy to qualify for"

favorable treatment as a "bona fide" news program. During the nearly five years this case has been pending, however, Fox has never contended that the Billboard Music Awards show was a news program, or that its uncertainty on that question led it to broadcast the expletives that the FCC found to be indecent. Nor has the network ever contended that the expletives used by Nicole Richie and Cher were anything other than gratuitous. See Pet. App. 71a, 95a.

ABC likewise contends (Br. in Opp. 19) that it had "no notice" that its broadcast of adult nudity in NYPD Blue "could be deemed indecent." But the network cannot seriously claim that nudity is "traditional program content" on prime-time broadcast television (*Reno*, 521 U.S. at 867), or that its repeated shots of an actress's buttocks as she prepared to shower were the equivalent of "a scene in [the film Schindler's List] depicting concentration [camp] prisoners 'made to run around the camp fully nude as the sick are sorted from the healthy.'" Pet. App. 145a.

ABC also argues (Br. in Opp. 11) that the Commission was inconsistent in distinguishing for indecency purposes between the relevant NYPD Blue episode and another program that involved an "eight-second depiction of buttocks." But the program that the FCC found not to be indecent involved the depiction of an infant. See *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 2664, 2718-2719, ¶¶ 224-226 (2006). ABC's refusal to acknowledge the difference between broadcast images of a nude adult and images of a nude infant illustrates the hostility to the FCC's longstanding "context-based approach" (*Fox*, 129 S. Ct. at 1812) that underlies both the net-

works' position and the court of appeals' decisions in these cases.

3. The court of appeals invalidated the Commission's context-based indecency enforcement policy as unconstitutionally vague even though it recognized that the greater certainty provided by a less flexible policy, such as a list of banned words, would raise its own "grave First Amendment concerns." Pet. App. 27a. Fox acknowledges (Br. in Opp. 25) that articulating an indecency policy that could satisfy the court of appeals "may well be challenging," and neither the Second Circuit nor any of the respondents has suggested a workable standard that could withstand the court of appeals' review. To be sure, the courts need not and should not "usurp the FCC's regulatory authority" (*id.* at 20 n.10) or "do the Commission's job for it" (ABC Br. in Opp. 32). But a decision that finds an agency's interpretation of a statute to be unconstitutionally vague *and* frankly acknowledges that a clearer standard would likely *also* be unconstitutional has the same practical effect as invalidation of the statute itself. That judgment warrants this Court's review.

4. ABC contends that if certiorari is granted, the questions presented should be broadened to include "all available grounds for affirmance." ABC Br. in Opp. 34; see Fox Br. in Opp. 26-27. None of the alternative grounds that respondents identify warrants this Court's review.

First, ABC contends (Br. in Opp. 26-27) that the availability of "V-chip" blocking technology supports the judgment below. That argument is not ripe for this Court's consideration, however, because the court of appeals did not address it. See *Fox*, 129 S. Ct at 1819

(This Court is "one of final review, 'not of first view.'") (citation omitted).

In any event, these cases are poor vehicles for considering the relevance (if any) of the V-chip to the constitutionality of television broadcast indecency regulation. Fox does not contend that the Billboard Music Awards shows were accurately rated to apprise viewers that the F-Word and S-Word would be uttered. See Pet. App. 50a, 92a. ABC's TV-14 (DLV) rating of the relevant NYPD Blue episode ("D" for suggestive or sexual dialogue, "L" for language, and "V" for violence, *id.* at 84a n.162) likewise would not have apprised viewers employing the V-chip system that nudity would be aired. See *id.* at 178a-179a. And while ABC's broadcast began with an advisory (invisible to a V-chip) stating that the program contained, *inter alia*, "partial nudity," such warnings do not provide adequate notice to the many viewers who tune into ongoing programs. *Pacifica*, 438 U.S. at 748.

In any event, ABC's argument about the V-chip rests on a flawed legal premise. Content-based regulations of broadcast speech are subject only to intermediate scrutiny, see *FCC* v. *League of Women Voters*, 468 U.S. 364, 380 (1984), under which "a regulation need not be the least speech-restrictive means of advancing the Government's interests," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994). Instead, "[s]o long as the means chosen are not substantially broader than necessary * * * the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 218 (1997) (citation omitted). In addition, the Commission has determined that the V-chip is not an ade-

quate substitute for its time-channeling regulation of indecency because, *inter alia*, networks often inaccurately rate their shows. See Pet. App. 81a-83a & nn.159, 162; see also *id.* at 177a-179a. That fact-intensive conclusion does not warrant this Court's review.

This Court likewise should not review respondents' contention that the First Amendment bars the government from penalizing ABC's broadcast of pre-scripted adult nudity in the relevant NYPD Blue episode because *Pacifica* "established the constitutional limits of the FCC's authority to regulate broadcast indecency." ABC Affiliates Br. in Opp. 26; see ABC Br. in Opp. 27-29. The *ABC* panel issued no episode-specific First Amendment decision because it relied entirely on *Fox*'s vagueness holding, see Pet. App. 124a-125a, and the *Fox* panel expressly declined to address the networks' claim that *Pacifica* established the limit of the FCC's regulatory authority, see *id.* at 17a-18a. The episode-specific constitutional claim would be most appropriately addressed by the court of appeals on remand in the first instance if this Court reverses the Second Circuit's vagueness determination. See *Fox*, 129 S. Ct. at 1819. In any event, this Court has "never held that *Pacifica* represented the outer limits of permissible regulation." *Id.* at 1815.

Finally, there is no sound reason for this Court to reconsider its decisions in *Pacifica* and in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). Accord ABC Affiliates Br. in Opp. 26; see also Center for Creative Voices in Media Br. in Opp. 1-7. "[T]he principles of *stare decisis* weigh heavily against overruling" this Court's precedents, and "even in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some 'special justification.'"

Dickerson v. *United States*, 530 U.S. 428, 443 (2000) (internal citation omitted). That principle is especially weighty here, where generations of "conscientious parents" have relied on the "regulation of broadcast programs" to ensure a "relatively safe haven for their children" in an increasingly coarse media environment. *Fox*, 129 S. Ct. at 1819.

Despite the changes in the media landscape since *Pacifica* was decided, broadcasting remains an extremely pervasive—and invasive—medium that continues to be highly accessible to children. See Pet. App. 78a-85a. In addition, intervening "technological advances have made it easier for broadcasters to bleep out offending words," *Fox*, 129 S. Ct. at 1813, and "the proliferation of numerous other media sources" (Fox Br. in Opp. 26) has increased the opportunities for dissemination to adults of programming not appropriate for children. Those changes reduce the burdens that regulation of broadcast indecency may entail.

Finally, broadcast regulation, including limits on indecent programming, reflects an exchange between broadcasters and the public. A broadcast licensee is "granted the free and exclusive use of a limited and valuable part of the public domain," but "when he accepts that franchise it is burdened by enforceable public obligations." *Fox*, 129 S. Ct. at 1806 (quoting *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981)). Respondents identify no sound constitutional basis for relieving the networks of those public obligations while they continue to enjoy free use of the public airwaves.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

JUNE 2011

AMICUS CURIAE BRIEF

No. 10-1293

In the Supreme Court of the United States

Federal Communications Commission, *et al.*,
Petitioners,
v.
Fox Television Stations, Inc. *et al.*, *Respondents.*

Federal Communications Commission, *et al.*,
Petitioners,
v.
ABC, Inc. *et al.*, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* PARENTS TELEVISION COUNCIL IN SUPPORT OF PETITIONERS

Robert R. Sparks, Jr.
Counsel of Record
Christopher T. Craig
Sparks & Craig, LLP
6862 Elm Street, Suite 360
McLean, Virginia 22101
(703) 848-4700
rrsparks@sparkscraig.com

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to this Court's Rule 37.1, Parents Television Council respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioners.

Written consent to the filing of this brief has been granted by counsel for Petitioners, and Counsel for Respondents and Intervenors, ABC, Inc., ABC Television Affiliates Association, KMBC Hearst-Argyle Television, Inc., KTRK Television, Inc., WLS Television, Inc., Citadel Communications, LLC, Fox Television Stations, Inc., WKOW Television, Inc., WSIL-TV, Inc., Young Broadcasting of Green Bay, Inc., Center for Creative Community, Inc. and Future of Music Coalition. Counsel for Respondents and Intervenors NBC Telemundo License Co., NBC Television Affiliates and CBS Broadcasting, Inc., did not respond to amicus's request for consent, necessitating the filing of this motion.

Dated: May 18, 2011.

Robert R. Sparks, Jr.
Counsel of Record
Christopher T. Craig
Sparks & Craig, LLP
6862 Elm Street, Suite 360
McLean, Virginia 22101
(703) 848-4700
rrsparks@sparkscraig.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF CASE INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

1. In *Pacifica*, the Court held that because of the broadcast media's pervasive scope, intrusive nature and accessibility to children, the FCC could constitutionally regulate the broadcast of indecent material 3

2. A public broadcaster's fiduciary duty to use the public airwaves for the public good is not a relic of a gentler time. It is still the law, as even the broadcasters acknowledge 4

3. The broadcasters have taken advantage of the uncertainty created by the litigation of these cases by broadcasting racier fare 5

4. The findings in PTC's Report foreshadow the future of broadcast television if the Court does not act in these cases and uphold the FCC's enforcement regime 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

FCC v. Pacifica Foundation.
438 U.S. 726 (1978) 2, 7

FCC v. League of Women Voters of California,
468 U.S. 364, 377 (1984) 2, 4

Turner Broadcasting Sys., Inc. v. FCC,
512 U.S. 622, 663 (1994) 2

United States v. Southwestern Cable Co.,
392 U.S. 157, 177 (1968) 2

Statutes and Regulations

18 U.S.C. § 1464 2. 4, 9

Other

http://www.nabshow.com/2011/newsRoom/pressRelease.asp?id=2506 4

http://parentstv.org/PTC/publications/reports/2010ProfanityStudy/study.pdf 5

http://www.parentstv.org/PTC/publications/reports /2004cablestudy/print.pdf 7

http://www.parentstv.org/PTC/news/release/2008/0410.asp 7

www.enoughisenoughcampaign.com 8

http://www.nypost.com/p/entertainment/tv/bare_bunny_gXMYN5xEilGo7DOZlbDhgN 9

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Parents Television Council (PTC) is a nonprofit, nonpartisan, grassroots organization dedicated to improving the content of entertainment programming, with an emphasis on prime time television. Founded in 1995, PTC is funded by contributions from its 1.1 million members and other supporters throughout the United States. It works with television producers, broadcasters and sponsors in an effort to stem the increasing tide of harmful messages targeted at children.

PTC has encouraged elected and appointed government officials and agencies to enforce broadcast decency standards that exist in statute and regulation, and it has encouraged its members and others to file complaints with the FCC about broadcasts they believe violate the indecency law, including the broadcasts at issue in this case. Many of the complaints filed with the FCC about the broadcasts at issue in these cases came from PTC members. PTC participated as *amicus curiae* in the Second Circuit proceedings below.

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[1] As required by Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties except NBC Telemundo License Co., NBC Televisions Affiliates and CBS Broadcasting, Inc. have consented in writing to the filing of this brief, and PTC has provided notice of filing of this brief to all parties as required by Supreme Court Rule 37.2.

STATEMENT OF THE CASE

PTC adopts the Petitioner's Statement.

INTRODUCTION AND ARGUMENT SUMMARY

The question squarely before the Court is whether the FCC's 2001 enforcement policy, as applied to these and other cases, passes constitutional muster. *Amicus* PTC urges the Court to grant certiorari not only to validate the FCC's challenged enforcement regime, but to make clear the Court's holding in *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978) and Section 1464 are still good law, and not quaint outliers overtaken by new times.

This Court has observed in another context that "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *Turner Broadcasting,* 512 U.S. 622, 663 (1994) (quoting *United States v. Southwestern Cable Co.,* 392 U.S. 157, 177 (1968)). As we show below, that is still true today.

The Court has also held that one who has been granted a license to broadcast over scarce public airwaves serves in a sense as a fiduciary for the public. *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984). The Court must decide in this case if that is still true today.

The broadcasters have exploited the uncertainty created by their multi-year contest of the FCC's efforts to police their broadcasts under the law by airing increasingly edgy fare on broadcast television. The coarser content shown on basic cable prefigures what the broadcasters will air on the public airways if the Second Circuit's decisions are allowed to stand.

Argument

The Court Should Grant Certiorari and Make Clear that the Congressional Intent to Regulate a Portion of the Content on Broadcast Television During a Portion of the Broadcast Day is Still a Legitimate Goal and is Not Unconstitutional

1. In *Pacifica*, the Court held that because of the broadcast media's pervasive scope, intrusive nature and accessibility to children, the FCC could constitutionally regulate the broadcast of indecent material.

Broadcast television is *still* a uniquely pervasive influence in America, and it *remains* uniquely accessible to children, bombarding viewers of all ages in the privacy of their own home. The National Association of Broadcasters (NAB) has addressed those very points. Only last month, at a NAB convention in Las Vegas, Nevada, NAB President and former Oregon Senator Gordon Smith observed that some 43 million Americans depend solely on over-the-air signals for television, and that

90 of the top 100 primetime television programs are on broadcast television, not cable.[2]

2. A public broadcaster's fiduciary duty to use the public airwaves for the public good is not a relic of a gentler time. It is still the law, as even the broadcasters acknowledge.

The public airways are owned by the public and licensed to the broadcasters, in return for which the broadcasters are to use them in accordance with the law – including Section 1464. The broadcasters want to use the airwaves as they see fit, unencumbered by the indecency statute. At the Las Vegas convention mentioned above, the NAB's President rightly noted that "Broadcasters have a unique identity. We are important voices in our local communities. We live where we broadcast, and we reflect the values of those communities, large and small across the country. . . . Broadcasting keeps our citizens connected to our communities and gives those communities coherence. That is a *public good* that we provide. The enduring value of broadcasting is not something that policymakers should take lightly" (emphasis added). *See* Press Release at n.1, above. Programming of the kind at issue in these cases hardly discharges the public good required of broadcasters by this Court, *see FCC v. League of Women Voters of California*, *supra*, and recognized by the NAB's President.

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[2] *See* Sen. Smith's remarks in his press release at http://www.nabshow.com/2011/newsRoom/pressRelease.asp?id=2506 .

3. The broadcasters have taken advantage of the uncertainty created by the litigation of these cases by broadcasting racier fare.

After the Second Circuit rendered its decision in *Fox, Amicus* PTC conducted a longitudinal study comparing the first two weeks of the 2010 season's primetime programming with the same period in 2005, comparing the volume and harshness of profanity occurring on broadcast television. *Habitat for Profanity: Broadcast TV's Sharp Increase in Foul Language* ("the Report")[3]. In the Report, PTC tested the truth of the assertion by Andrew Schwartzman of the Media Access Project that "There's no question that [the 2nd Circuit's] decision is going to mean more [explicit content] . . . they're already getting much more aggressive about trying to get stuff in." Report at 2.

PTC found that:

- The use of profanity on prime-time broadcast entertainment programming increased 69.3% from 2005 to 2010;

- The largest increases were found in the use of what the Report referred to as the "harshest profanities," and in explicit references to genitalia and bodily functions;

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[3] PTC's complete report, with data, results and analysis can be found at http://www.parentstv.org/PTC/publications/reports/2010ProfanityStudy/study.pdf.

- The greatest increase in the use of the harshest profanities occurred in the 8:00 p.m to 9 p.m ET time period, which is also known as the Family Hour;

- Use of the word "fuck," whether bleeped or muted, increased from 11 instances in 2005 to 276 instances in 2010 – including a ten-fold increase in the use of that word during Family Hour. Use of the word "shit" was used in bleeped or muted form 11 times in 2005; by 2010 it was used 95 times. That count does not included the coy use of "shit" in the title of the CBS show, *$#*! My Dad Says*, or NBC's scripted, unbleeped use of the word in a recent broadcast of *30 Rock*. Report at 3.

- Use of the word "balls" to refer to male genitalia increased 200%, use of the word "screw" increased 121%, and use of the word "boobs" in reference to breasts increased 90%. *Id.*

The Report notes that "A 69% increase in scripted profanity on pre-planned, filmed entertainment is not equivalent to a couple slips of the tongue during live events. The statistics above demonstrate that use of such language by the networks is both *deliberate and pervasive*" (emphasis added) *Id.* at 4).

4. The findings in PTC's Report foreshadow the future of broadcast television if the Court does not act in these cases and uphold the FCC's enforcement regime.

The Court need not guess what the broadcasters will do with broadcast television programming if the Second Circuit's holding in *Fox* is left undisturbed. The future is now on basic cable television.

PTC published a November 2004 report entitled, *Basic Cable Awash in Raunch: A content analysis of expanded basic cables Original Prime-Time series.*[4] There, PTC compiled a 16-page manuscript of dialog and stage directions culled from basic cable television programming on the air at the time. The 2004 programming had it all: all seven dirty words discussed in *Pacifica*, and graphic sexual content, including explicit dialog, strippers, nudity, masturbation and oral sex.

By 2008, it was worse. That year, PTC released another study of basic cable fare, *Children Assaulted by Sex, Violence, Drugs and Explicit Language on BET and MTV*,[5] conducted in conjunction with Enough is Enough – a campaign protesting the commercialization and marketing of negative and derogatory images of black men and

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[4] PTC's 2004 report can be found at http://www.parentstv.org/PTC/publications/reports/2004cablestudy/print.pdf

[5] The 2008 report can be found at http://www.parentstv.org/PTC/news/release/2008/0410.asp.

women in the entertainment industry, sponsored by Citizens for Change, Inc.[6] PTC's study analyzed adult content airing on BET's Rap City and 106 & Park and on MTV's Sucker Free on MTV for a two-week period in December 2007 during afternoon or early evening hours when children were at home after school, and in March 2008. The latter period showed even higher levels of adult content in March 2008 than in December 2007. For example, PTC found:

- 746 sexually explicit scenes or lyrical references in the 27.5 hours of analyzed programming from the December study period for an average of 27 instances per hour, or one instance every 2.2 minutes. Sexual content was even more common in the March test period, with an average 40 instances per hour, or one instance every 90 seconds;

- 475 uses of explicit language and obscene gestures in December for an average of 17 instances per hour, or one instance every 3.5 minutes, and 495 uses of explicit language and obscene gestures in March, for an average of 35 instances per hour, or one instance every 1.7 minutes.

Much of the seedy content now on basic cable could not be aired on broadcast television prior to the Second Circuit's holding in *Fox*. But that is not true anymore and the broadcasters are pushing the

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[6] www.enoughisenoughcampaign.com

limits already. For example, CBS announced on May 12, 2011 that it plans to air in the Fall *The Playboy Club*, a series in which some of its actors have signed contracts that include a provision requiring them to shoot nude scenes, as necessary. According to press reports, "nudity" includes "simulated sex acts" as well.[7]

Conclusion

This case is about whether Section 1464 is to have any vitality in affecting what broadcasters send into American homes, or whether the indecency law and regulations are a polite fiction to be ignored. The Second Circuit's decisions in *Fox* and *ABC* have effectively struck down Section 1464 without explicitly saying so. If that statute is truly unconstitutional – and PTC contends that it is not – it is for this Court to say so. It is not a proper role for the Second Circuit to purport to strike down the FCC's recent enforcement scheme when the practical effect of such a ruling is to undo completely any hope of enforcement anywhere of Section 1464.

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[7] *New York Post*, April 1, 2011: http://www.nypost.com/p/entertainment/tv/bare_bunny_gXMYN5xEiIGo7DOZlbDhgN. As of the writing of this brief, it is not clear that CBS intends to broadcast nude scenes on broadcast television.

For the reasons we have set out above, this Court should review and overturn the Second Circuit in both *Fox* and *ABC*.

Respectfully Submitted,

Robert R. Sparks, Jr.,
Counsel of Record
Christopher T. Craig
Sparks & Craig, LLP
6862 Elm Street, Suite 360
McLean, Virginia 22101
(703) 848-4700
rrsparks@sparkscraig.com
Counsel for *amicus curiae*
Parents Television Council

JOINT APPENDIX

No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

DONALD B. VERRILLI, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record

MIGUEL A. ESTRADA
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
MEstrada@gibsondunn.com

WADE H. HARGROVE, JR.
Brooks Pierce McLennon Humphrey & Leonard
150 Fayetteville St., Suite 1600
Raleigh, N.C. 27601
whargrove@brookspierce.com

CARTER G. PHILLIPS
Sidley Austin LLP
1501 K St., N.W.
Washington, D.C. 20005
cphillips@sidley.com

Additional counsel on inside page

PETITION FOR A WRIT OF CERTIORARI FILED: APR. 22, 2011
CERTIORARI GRANTED: JUNE 27, 2011

TABLE OF CONTENTS

Page

Court of Appeals docket entries (*Fox Television Stations, Inc.* v. *FCC*) 1

Court of Appeals docket entries (*ABC, Inc.* v. *FCC*) 21

FCC Order, *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005* (Mar. 15, 2006) 39

Selected viewer complaints (2003 Billboard Music Awards) 194

Comments of Minnesota Public Radio (Sept. 21, 2006) . 204

Letter from Jim Dyke, Executive Director, TV Watch (Sept. 21, 2006) 272

Declaration of Nicole A. Bernard (Sept. 20, 2006) 281

Declaration of Ed Goren (Sept. 20, 2006) 287

Declaration of Peter Liguori (Sept. 20, 2006) 290

Declaration of Dennis Swanson (Sept. 20, 2006) 294

Selected viewer complaints (NYPD Blue) 298

ANDREW JAY SCHWARTZMAN
Media Access Project
1625 K St., N.W.
Suite 1000
Washington, D.C. 20006
andys@mediaacess.org

ROBERT L. CORN-REVERE
Davis Wright Tremaine, LLP
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
bobcornrevere@dwt.com

SETH P. WAXMAN
Wilmer Cutler Pickering Hale
& Dorr LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
seth.waxman@wilmerhale.com

* *Counsel of Record*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1760-ag

FOX TELEVISION STATIONS, INC., CBS BROADCASTING INC., WLS TELEVISION, INC., KTRK TELEVISIONS, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC INC., PETITIONERS

v.

FEDERAL COMMUNICATION COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION, INTERVENORS

DOCKET ENTRIES

DATE	PROCEEDINGS
4/13/06	Case Docketed: Petition for review of agency order on behalf of PETITIONER CBS Broadcasting Inc., Fox Television Stations, Inc., filed. [Entry date Apr 17 2006] [BM]

* * * * *

DATE	PROCEEDINGS
4/14/06	Movant NBC Telemundo License Co., Movant NBC Television Affiliates', Movant NBC Universal, Inc. motion for leave to intervene/ become party filed with proof of service. [Entry date Apr 17 2006] [BM]
4/14/06	Movant FBC Television Affiliates Association, Movant CBS Television Network Affiliates motion for leave to intervene/become party filed with proof of service. [Entry date Apr 17 2006] [BM]
	* * * * *
5/1/06	Before: Hon. Dennis Jacobs, Circuit Judge Order FILED GRANTING motion intervene/ become party by Movant NBC Universal, Inc., Movant NBC Telemundo License Co., Movant NBC Television Affiliates', endorsed on motion dated 4/14/06. (AMH) [Entry date May 1 2006] [BM]
5/1/06	Order FILED GRANTING motion intervene/become party by Movant FBC Television Affiliates Association, Movant CBS Television Network Affiliates, endorsed on motion dated 4/14/2006. (AMH) [Entry date May 1 2006] [BM]
	* * * * *

DATE	PROCEEDINGS
5/12/06	Movant Center for the Creative Community, Inc. motion for leave to intervene/become party filed with proof of service. [Entry date May 15 2006] [BM]
	* * * * *
5/23/06	Certified list of items comprising the record on appeal filed. [Entry date Jun 1 2006] [BM]
5/23/06	Before: Hon. Rosemary S. Pooler, Circuit Judge, Order FILED GRANTING motion intervene/become party by Intervenor Center for the Creative Community, Inc., endorsed on motion dated 5/12/2006. (TWY) [Entry date May 23 2006] [BM]
	* * * * *
7/6/06	Respondent United States of America, Respondent Federal Communications Commission motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 12 2006] [BM]
7/6/06	Intervenor ABC Television Affiliates Association, Petitioner KMBC Hearst-Argyle Television, Inc., response in support of the motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 12 2006] [BM]

DATE	PROCEEDINGS
	* * * * *
7/6/06	Intervenor CBS Television Network Affiliates, Intervenor NBC Television Affiliates', response in support of the respondents' motion for remand filed with proof of service. [Entry date Jul 11 2006] [BM]
7/6/06	Intervenor FBC Television Affiliates Association, Petitioner CBS Broadcasting Inc., Petitioner Fox Television Stations, Inc., in opposition to Interventors' motion for extension of time filed with proof of service. [Entry date Jul 11 2006] [BM]
7/6/06	Petitioner KTRK Television, Inc., Petitioner ABC Inc., response in support of the respondents' motion for voluntary remand filed with proof of service. [Entry date Jul 11 2006] [BM]
7/7/06	Intervenor NBC Telemundo License Co., Interventor NBC Universal, Inc., in opposition to motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 11 2006] [BM]
7/7/06	Petitioner CBS Broadcasting Inc., response in opposition to motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 11 2006] [BM]
	* * * * *

DATE	PROCEEDINGS
7/10/06	Petitioner Fox Television Stations, Inc., motion for stay during remand period filed with proof of service. [Entry date Jul 11 2006] [BM]
	* * * * *
7/11/06	Respondent United States of America, Respondent Federal Communications Commission reply for voluntary remand and stay briefing schedule filed with proof of service. [Entry date Jul 13 2006] [BM]
	* * * * *
7/12/06	Petitioner CBS Broadcasting Inc., amended opposition to joint motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 13 2006] [BM]
7/14/06	Intervenor FBC Television Affiliates Association, Petitioner Fox Television Stations, Inc., reply in support of alternative motion for stay during remand period filed with proof of service. [Entry date Jul 19 2006] [BM]
	* * * * *

DATE	PROCEEDINGS
7/28/06	Motion for remand, stay and to strike opposition is on the substantive motions calendar for August 29, 2006**TO BE ARGUED**; and responsive papers to calendar ASAP. [Entry date Jul 28 2006] [JC]
8/7/06	Petitioner Fox Television Stations, Inc., et al leave to file supplemental memorandum in support of Oppositions to Joint motion for Voluntary Remand filed with proof of service. [Entry date Aug 9 2006] [BM]
8/11/06	Intervenor Center for the Creative Community, Inc. motion for leave to file opposition filed with proof of service. [Entry date Aug 11 2006] [BM]
	* * * * *
8/21/06	Respondent United States of America, Respondent Federal Communications Commission, response to joint motion to file supplemental memorandum filed with proof of service. [Entry date Aug 22 2006] [BM]
8/23/06	Petitioner Fox Television Stations, Inc., motion for leave file supplemental reply memorandum filed with proof of service. [Entry date Aug 24 2006] [BM]
	* * * * *

DATE	PROCEEDINGS
8/24/06	Order **FILED GRANTING** motion file supplemental appendix by **Petitioner Fox Television Stations, Inc., Petitioner CBS Broadcasting Inc., Intervenor FBC Television Affiliates Association, Intervenor CBS Television Network Affiliates, endorsed on motion dated 8/23/2006** [Entry date Aug 25 2006] [SC]
	* * * * *
9/7/06	Present: Hon. Ralph K. Winter, Hon. Jose A. Cabranes, Hon. Rosemary S. Pooler, Circuit Judges. Upon due consideration, it is **ORDERED** that the motion of Fox and CCV to file supplemental memorandum are **GRANTED**, and respondents' motion to strike the opposition of CBS is **DENIED as moot inasmuch as the challenged opposition papers have been withdrawn. It is further ORDERED** that the respondents' motion to **REMAND** the cause to the **FCC** for a period of sixty (60) days from the date of the entry of this order is **GRANTED** for the entry of a further final or appealable order of the **FCC** following such further consideration as the **FCC** may deem appropriate in the circumstances. **By** stipulation of the parties, including the **FCC**, at oral argument on **August 29, 2006**, enforcement of Section III.B of the Omnibus Order, which

DATE	PROCEEDINGS

applies the standards announced in the Golden Globe Order, is hereby STAYED pending further order of this Court, and the instant appeal shall be AUTOMATICALLY REINSTATED as of the sixty-first day following the date of the entry of this order. THE APPEAL THEREAFTER SHALL BE EXPEDITED as follows: petitioners shall file petitions for review and briefs in support thereof no later than fourteen (14) days after the date of reinstatement of this appeal; respondent FCC shall file its brief in response to any such petitions for review no later than fourteen (14) days following the filing of the petitions for review pursuant to the terms of this order; and petitioners shall file reply briefs no later than seven (7) days after the date of the filing of respondent FCC's responsive brief, as of which dated the cause shall be deemed SUBMITTED for argument and decision. The Clerk of the Court is hereby directed to include the instant petition in the first calendar proposed after the petition's reinstatement. By: Lucille Carr. [Entry date Sep 7 2006] [BM]

* * * * *

DATE	PROCEEDINGS
11/8/06	Notice of reinstatement pursuant to Order dated 9/7/2006. [Entry date Nov 8 2006] [BM]
	* * * * *
11/21/06	Letter dated 11/21/2006 received from Petitioners' Attorney, Seth P. Waxman, requesting that this petition be held in abeyance. [Entry date Nov 21 2006] [BM]
11/21/06	Letter dated 11/21/2006 received from David Kusher, Counsel to KMBC Hearst-Argyle Television, Inc., requesting that this petition be held in abeyance. [Entry date Nov 22 2006] [BM]
11/22/06	INTERVENOR FBC Television Affiliates Association; PETITIONER Fox Television Stations, Inc., brief filed with proof of service. [Entry date Nov 22 2006] [BM]
11/22/06	INTERVENTOR FBC Television Affiliates Association; PETITIONER Fox Television Stations, Inc., special appendix filed (w/pfs) [Entry date Nov 22 2006] [BM]
11/22/06	INTERVENOR FBC Television Affiliates Association; PETITIONER Fox Television Stations, Inc., joint appendix, volume 1, filed, w/pfs. [Entry date Nov 22 2006] [BM]

DATE	PROCEEDINGS

11/22/06 **INTERVENOR FBC Television Affiliates Association; PETITIONER Fox Television Stations, Inc., joint appendix, volume 2, filed,** w/pfs. [Entry date Nov 22 2006] [BM]

* * * * *

11/22/06 PETITIONER CBS Broadcasting Inc., brief filed with proof of service. [Entry date Nov 22 2006] [BM]

* * * * *

11/22/06 Order FILED GRANTING motion consolidate appeals by Petitioner Fox Television Stations, Inc., endorsed on motion dated 11/21/2006. (SC) [Entry date Nov 28 2006] [BM]

* * * * *

11/27/06 Order filed stating:

IT IS HEREBY ORDERED:

That petition for review of 06-2750-ag only is held in abeyance based on letter submitted to the Court dated 11/21/06. Endorsed by: Shane Clouden. [Entry date Nov 27 2006] [SC]

* * * * *

DATE	PROCEEDINGS
11/27/06	INTERVENOR Center for the Creative Community, Inc., brief filed with proof of service. [Entry date Nov 28 2006] [BM]
	* * * * *
11/27/06	INTERVENOR NBC Telemundo License Co., NBC Universal, Inc., brief filed with proof of service. [Entry date Nov 28 2006] [BM]
	* * * * *
11/28/06	Letter dated 11/21/2006 received from Intervenors CBS and NBC Affiliates' Attorney, Robert A. Long, Jr., advising the Court that they will not file a brief in this appeal. [Entry date Nov 28 2006] [BM]
	* * * * *
11/29/06	AMICUS CURIAE Glen Robinson, brief filed with proof of service. [Entry date Nov 30 2006] [BM]
	* * * * *
11/30/06	AMICUS CURIAE American Booksellers Foundation for Free Expression, American Civil Liberties Union, American Federation of Television and Radio Artists, Brennan Center for Justice, ET AL, brief filed with proof of service. [Entry date Dec 4 2006] [BM]

DATE	PROCEEDINGS

* * * * *

11/30/06 AMICUS CURIAE Center for Democracy and Technology, Adam Thierer, brief filed with proof of service. [Entry date Dec 5 2006] [BM]

* * * * *

12/7/06 RESPONDENT Federal Communications Commission, United States of America, brief filed with proof of service. [Entry date Dec 8 2006] [BM]

* * * * *

12/13/06 AMICUS CURIAE Morality in Media, Inc., brief filed with proof of service. [Entry date Dec 14 2006] [BM]

* * * * *

12/14/06 PETITIONER Fox Television Stations, Inc., reply brief filed with proof of service. [Entry date Dec 14 2006] [BM]

12/14/06 INTERVENOR NBC Telemundo License Co., NBC Universal, Inc., reply brief filed with proof of service. [Entry date Dec 15 2006] [AS]

* * * * *

DATE	PROCEEDINGS
12/14/06	AMICUS CURIAE Thomas North, brief filed with proof of service. [Entry date Dec 14 2006] [BM]
	* * * * *
12/15/06	PETITIONER CBS Broadcasting Inc., reply brief filed with proof of service. [Entry date Dec 15 2006] [AS]
	* * * * *
12/20/06	Case heard before POOLER, LEVAL, HALL, C.JJ CD DATE: 12/20/06 [Entry day Dec 29 2006] [RD]
	* * * * *
6/4/07	Petition for review is GRANTED, the order of the FCC is VACATED and the case is REMANDED to the agency by published signed opinion filed. (RSP). Judge Leval dissents in a separate opinion. [Entry date Jun 4 2007] [DB]
	* * * * *
6/4/07	Judgment filed. [Entry date June 4 2007] [DB]
	* * * * *
7/27/07	Judgment MANDATE ISSUED. CLOSED [Entry date Jul 27 2007] [DB]

DATE	PROCEEDINGS
	* * * * *
3/24/08	Writ of Certiorari GRANTED [Entry date Apr 3 2008] [BM]
3/24/08	Notice of Reinstatement dated 3/24/2008, Writ of Certiorari GRANTED, FILED. Reinstatement Code: M. [Entry date Apr 7 0208] [BM]
4/7/08	Letter sent to the FCC recalling mandate. [Entry date Apr 7 2008] [BM]
8/7/08	Copy of noticed by Supreme Court RECEIVED: Requesting the entire record in the above case. [Entry date Aug 18 2008] [BM]
8/18/08	Acco, Brief and Appendix transmitted to the Supreme Court. [Entry date Aug 18 2008] [BM]
5/1/09	Supreme Court opinion filed. The judgement is reversed and the case is remanded. [Entry date May 4 2009] [BM]
6/1/09	Supreme Court judgment filed. [Entry date Jun 11 2009] [BM]
6/16/09	Letter dated 6/15/2009 received from Respondent's Attorney, Jacob M. Lewis, requesting a supplemental briefing schedule. [Entry date Jun 16 2009] [BM]

DATE	PROCEEDINGS
6/17/09	Order filed stating: The mandate in this case having been returned from the Supreme Court, the parties, including intervenors, are directed to appear at a scheduling conference on Wednesday, August 5, 2009 at 10:00 a.m. in Room 850 of the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, New York, NY. The conference will be open to the public. Before: Hon. Pierre N. Leval, Hon. Rosemary S. Pooler, Hon. Peter W. Hall, Circuit Judges (FP) [Entry date Jun 17 2009] [BM]
	* * * * *
6/17/09	Set for argument on 8/5/09 B Panel {10am in Room 850 of the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, NY} [Entry date Jun 17 2009] [AV]
	* * * * *
7/30/09	Movant Future of Music Coalition motion leave to intervene/become party filed with proof of service. [Entry date Jul 30 2009] [BM]
	* * * * *

DATE	PROCEEDINGS
8/4/09	Order FILED GRANTING motion intervene/become party by Movant Future of Music Coalition, endorsed on motion dated 7/30/2009. Before: Pierre N. Leval, Rosemary S. Pooler, Peter W. Hall, Circuit Judges. [Entry date Aug 4 2009] [BM]
8/5/09	Scheduling Conference heard before: POOLER, LEVAL, HALL, C.JJ. [Entry date Aug 5 2009] [SC]
8/5/09	Order filed stating, as stated at today's scheduling conference, the petitioners, and any amici supporting petitioners, are to submit their opening briefs by September 16, 2009; respondents, and any amici supporting respondents, are to submit their responsive briefs by October 28, 2009; and petitioners are to submit their replies by November 12, 2009. The date of oral argument will be determined after the responsive briefs have been filed. (Before Hon. PNL, RSP, PWH, endorsed for the Court by FP) [Entry date Aug 5 2009] [DC]
	* * * * *
9/16/09	INTERVENOR ABC Television Affliates Association, brief filed with proof of service. [Entry date Sep 16 2009] [BM]

DATE	PROCEEDINGS
9/16/09	INTERVENOR ABC Television Affliates Association, brief filed with proof of service. [Entry date Sep 16 2009] [BM]
9/16/09	INTERVENOR Center for the Creative Community, Inc., Future of Music Coalition, brief filed with proof of service. [Entry date Sep 16 2009] [BM]
9/16/09	PETITIONER ABC Inc., CBS Broadcasting Inc., KTRK Television, Inc., WLS Television, Inc, & INTERVENORS NBC Universal, Inc, NBC Telemundo License Co, brief filed with proof of service. [Entry date Sep 17 2009] [BM]
9/17/09	PETITIONER Fox Television Stations, Inc., brief filed with proof of service. [Entry date Sep 17 2009] [BM]
9/18/09	AMICUS CURIAE The Media Institute, The Thomas Jefferson Center for the Protection of Free Expression, brief filed with proof of service. [Entry date Sep 21 2009] [BM]
9/18/09	AMICUS CURIAE Glen Robinson, Henry Geller, James Quello, Jerald Fritz, ET AL, brief filed with proof of service. [Entry date Sep 21 2009] [BM]

DATE	PROCEEDINGS
9/18/09	AMICUS CURIAE American Booksellers Foundation for Free Expression, American Civil Liberties Union, American Federation of Television and Radio Artists, Brennan Center for Justice, ET AL, brief filed with proof of service. [Entry date Sep 21 2009] [BM]
10/28/09	AMICUS CURIAE Family Research Counsel, Focus on the Family, brief filed with proof of service. [Entry date Oct 28 2009] [BM]
10/28/09	AMICUS CURIAE Morality in Media, Inc., brief filed with proof of service. [Entry date Oct 29 2009] [BM]
10/28/09	AMICUS CURIAE Decency Enforcement Center For Television, brief filed with proof of service. [Entry date Oct 29 2009] [BM]
10/29/09	RESPONDENT Federal Communications Commission, United States of America, brief filed with proof of service. [Entry date Oct 29 2009] [BM]
	* * * * *
11/2/09	AMICUS CURIAE Parents Television Council, brief filed with proof of service. [Entry date Nov 2 2009] [BM]

DATE	PROCEEDINGS
11/12/09	PETITIONER ABC Inc., CBS Broadcasting Inc., KTRK Television, Inc., WLS Television, Inc, reply brief filed with proof of service. [Entry date Nov 13 2009] [BM]
11/13/09	PETITIONER Fox Television Stations, Inc., reply brief filed with proof of service. [Entry date Nov 16 2009] [BM]
	* * * * *
12/15/09	Set for argument on 1/13/10 B Panel {3pm} [Entry date Dec 15 2009] [AV]
	* * * * *
1/13/10	Case heard before panel: LEVAL, POOLER, HALL, C. JJ. [Entry date Jan 13 2010] [AG]
	* * * * *
6/30/10	RESPONDENT Federal Communications Commisson, 28(J) letter dated 6/25/2010, FILED. [Entry date June 30 2010] [BM]
7/7/10	Letter dated 6/30/2010 filed by Petitioners and Intervenors Fox Television Stations, Inc., CBS Broadcasting Inc., NBC Universal, Inc., and NBC Telemundo License Co, responding to Respondent's 28(j) Letter. [Entry date Jul 7 2010] [BM]

DATE	PROCEEDINGS
7/13/10	Judgment MANDATE ISSUED. CLOSED [Entry date Jul 13 2010] [AG]
	* * * * *
4/22/11	WRIT OF CERTIORARI, on behalf of Respondents Federal Communications Commisson and United States of America,
	* * * * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 08-0841-ag

ABC, INC., KTRK TELEVISION, INC., ET AL,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED
STATES OF AMERICA, RESPONDENTS

DOCKET ENTRIES

DATE	PROCEEDINGS
2/21/08	Case Docketed: Petition for review of agency order on behalf of PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc, filed. [Entry date Feb 22 2008] [JR]
2/21/08	Copy of receipt re: payment of $450.00 docketing fee filed on behalf of PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc,. RECEIPT #: 191983. [Entry date Feb 22 2008] [JR]
2/21/08	Copy of Forfeiture Order of the FCC released 2/19/08 filed. [Entry date Feb 22 2008] [JR]

DATE	PROCEEDINGS
2/22/08	Served copy of petition under cover letter on respondents. [Entry date Feb 22 2008] [JR]
	* * * * *
3/5/08	Notice of appeal acknowledgment letter from Jacob M. Lewis received. [Entry date Mar 5 2008] [JR]
	* * * * *
3/6/08	Scheduling order #1 filed. Record or certified list due 4/3/2008. Petitioners brief due 4/10/2008. Respondents brief due 5/12/2008. Ready week 6/23/2008. (LG) [Entry date Mar 7 2008] [JR]
	* * * * *
3/21/2008	Scheduling order #2 filed. Record or certified list due 5/5/2008. Petitioners brief due 5/23/2008. Respondents brief due 7/23/2008. Reply brief due 8/20/2008. Ready week 9/15/2008. (LG) [Entry date Mar 24 2008] [JR]
	* * * * *

DATE	PROCEEDINGS
3/24/08	Movant CBS Broadcasting Inc., Movant Fox Television Stations, Inc., Movant NBC Universal, Inc., et al motion seeking leave to intervene pursuant to 28 U.S.C. Section 2348 and Fed. R. App. P. 15 (d) filed with proof of service. [Entry date Mar 25 2008] [JR]
	* * * * *
4/1/08	Order FILED REFERRING motion to intervene by Movant Fox Television Stations, Inc., Movant CBS Broadcasting Inc., Movant NBC Universal, Inc., Movant NBC Telemundo License Co., endorsed on motion dated 3/24/2008. IT IS HEREBY ORDERED that the motion will be determined by a three-judge motions panel in due course. Before: PWH, CJJ. (JF) [Entry date Apr 1 2008] [JR]
	* * * * *
4/22/08	Notice to counsel issued regarding: Motion for Leave to Intervene has been placed on this Court's Substantive Motions Calendar for TUESDAY, MAY 6, 2008, **TO BE SUBMITTED**. Any opposing papers to Calendar Team As Soon As Possible. [Entry date Apr 22 2008] [AG]

DATE	PROCEEDINGS
5/5/08	Certified list of items comprising the record on appeal filed. [Entry date May 5 2008] [JR]
5/7/08	Notice to counsel regarding Court's Order granting the Movants' motion to intervene in this proceeding. [Entry date May 7 2008] [JR]
5/7/08	The CAPTION PAGE for this appeal has been AMENDED. [Entry date May 7 2008] [JR]
	* * * * *
5/7/08	Order FILED GRANTING motion to intervene by Movant Fox Television Stations, Inc., Movant CBS Broadcasting Inc., Movant NBC Universal, Inc., Movant NBC Telemundo License Co., endorsed on motion dated 3/24/2008. Movant Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., and CBS Broadcasting Inc., through counsel, move to intervene in this proceeding. Upon due consideration, it is hereby ORDERED that the motion is GRANTED. Before: RKW & PWH, CJJ. * The Honorable Louis F. Oberdorfer, Senior District Judge of the District of Columbia, sitting by designation, was a member of the panel but has recused himself; Pursuant to Interim

DATE	PROCEEDINGS
	Local Rule 0.14(b), these motions are being decided by the two remaining members of the panel who are in agreement as to the disposition. [Entry date May 7 2008] [JR]
	* * * * *
5/8/08	Respondent Federal Communications Commission motion for leave to file Corrected Certified List of Items in the record filed with proof of service. [Entry date May 8 2008] [JR]
5/13/08	Scheduling order #3 filed. Petitioners brief due 6/20/2008. Respondents brief due 8/22/2008. Petitioners reply brief due 9/19/08. Ready week 10/20/2008. (LG) [Entry date May 14 2008] [JR]
	* * * * *
5/14/08	RESPONDENT Federal Communications Commission, CORRECTED certified list of items comprising the record on appeal filed. [Entry date May 14 2008] [JR]
5/14/08	The CAPTION PAGE for this appeal has been AMENDED to reflect consolidation of cases. [Entry date May 14 2008] [YL]
	* * * * *

DATE	PROCEEDINGS
5/14/08	Order **FILED GRANTING** motion for leave to file Corrected Certified List in the record by Respondent Federal Communications Commission, endorsed on motion dated 5/8/2008. **IT IS HEREBY ORDERED** that Respondent FCC's motion for leave to file a corrected certified list of items on the record is **GRANTED**. Before: PWH, CJJ. (JF) [Entry date May 14 2008] [JR]
5/30/08	Respondent Federal Communications Commission motion for leave to file Second Corrected Certified List of Items in the record filed with proof of service. [Entry date Jun 3 2008] [JR]
6/3/08	The **CAPTION PAGE** for this appeal has been **AMENDED**. [Entry date Jun 3 2008] [JR]
	* * * * *
6/4/08	**RESPONDENT** Federal Communications Commission, Second Corrected Certified List of Items comprising the record on appeal filed. [Entry date Jun 4 2008] [JR]
	* * * * *

DATE	PROCEEDINGS
6/4/08	Order FILED GRANTING motion for leave to file Second Corrected Certified List of Items in the record by Respondent Federal Communications Commission, endorsed on motion dated 5/30/2008. IT IS HEREBY ORDERED that the motion is GRANTED. Second corrected certified list of items in record substitutes the certified list filed on 5/5/08. (JP) [Entry date Jun 4 2008] [JR]
6/20/08	PETITIONER ABC Television Affliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, ET AL, brief and appendix filed with proof of service. [Entry date Jun 25 2008] [JR]
6/20/08	INTERVENOR CBS Broadcasting Inc., brief filed with proof of service. [Entry date Jun 25 2008] [JR]
6/23/08	PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc, brief filed with proof of service. [Entry date Jun 25 2008] [JR]
6/23/08	PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc, special appendix filed, w/pfs. [Entry date Jun 25 2008] [JR]

DATE	PROCEEDINGS
6/23/08	INTERVENOR Fox Television Stations, Inc., NBC Telemundo License Co., NBC Universal, Inc., brief filed with proof of service. [Entry date Jun 25 2008] [JR]
7/1/08	AMICUS CURIAE Center for Creative Voices in Media, Future of Music Coalition, brief filed with proof of service. [Entry date Jul 1 2008] [JR]
	* * * * *
7/1/08	Amicus Curiae Center for Creative Voices in Media, Amicus Curiae Future of Music Coalition motion for leave to file appendix to brief of amicus curiae filed with proof of service. [Entry date Jul 1 2008] [JR]
	* * * * *

DATE	PROCEEDINGS
7/8/08	Order FILED DENYING motion for leave to file appendix by Amicus Curiae Center for Creative Voices in Media, Amicus Curiae Future of Music Coalition, endorsed on motion dated 7/1/2008. IT IS HEREBY ORDERED that the motion by Amicus Curiae Center for Creative Voices and Future of Music Coalition for leave to file appendix to amicus brief is DENIED. Unless amicus can show that document was part of record before agency, it is not properly treated as part of an appendix. Before: RR, CJJ. (JF) [Entry date Jul 8 2008] [JR]
7/9/08	PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc, Correct Covers, FILED. [Entry date Jul 11 2008] [JR]
7/14/08	PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc, Correct Covers Received for joint and special appendices, FILED. [Entry date Jul 14 2008] [JR]
	* * * * *
8/25/08	RESPONDENT Federal Communications Commission, United States of America, brief filed with proof of service. [Entry date Aug 25 2008] [JR]

DATE	PROCEEDINGS
8/25/08	RESPONDENT Federal Communications Commission, United States of America, brief filed with proof of service. [Entry date Aug 25 2008] [JR]
8/28/08	AMICUS CURIAE Morality In Media, Inc., brief filed with proof of service. [Entry date Aug 29 2008] [JR]
	* * * * *
8/29/08	Movant Parents Television Council motion for leave to file brief as amicus curiae in support of the FCC filed with proof of service. [Entry date Sep 2 2008] [JR]
	* * * * *
9/3/08	Order FILED REFERRING motion for leave to file brief as amicus curiae by Movant Parents Television Council, endorsed on motion dated 8/29/2008. IT IS HEREBY ORDERED that the motion is REFFERRED to the panel who will be hearing the merits of the appeal. (JP) [Entry date Sep 3 2008] [JR]
9/8/08	AMICUS CURIAE Decency Enforcement Center For Television, Corrected Covers, RECEIVED. [Entry date Sep 9 2008] [JR]

DATE	PROCEEDINGS
9/8/08	AMICUS CURIAE Decency Enforcement Center For Television, brief filed with proof of service. [Entry date Sep 9 2008] [JR]
	* * * * *
9/19/08	PETITIONER ABC Television Affliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, ET AL , reply brief filed with proof of service. [Entry date Sep 19 2008] [JR]
9/19/08	INTERVENOR CBS Broadcasting Inc., reply brief filed with proof of service. [Entry date Sep 22 2008] [JR]
9/22/08	INTERVENOR Fox Television Stations, Inc., NBC Telemundo License Co., NBC Universal, Inc., reply brief filed with proof of service. [Entry date Sep 22 2008] [JR]
9/22/08	PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc, reply brief filed with proof of service. [Entry date Sep 23 2008] [JR]
	* * * * *
9/25/08	Proposed for argument the week of 12/15/08 [Entry date Sep 25 2008] [DC]
	* * * * *

DATE	PROCEEDINGS
10/9/08	Argument Requested - Local Rule 34 Acknowledgment Returned by PETITIONER ABC Inc., ABC Television Affliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, ET AL; RESPONDENT Federal Communications Commission, United States of America, All parties seek oral argument. [Entry date Oct 9 2008] [AG]
10/14/08	Argument as early as week of 12/22/08 [Entry date Oct 14 2008] [DC]
10/16/08	Letter dated 10/16/08 from Seth P. Waxman, Esq., stating that he will not be available for oral argument on the week of December 22, 2008. [Entry date Oct 16 2008] [JR]
12/10/08	Proposed for argument the week of 2/02/09-A [Entry date Dec 10 2008] [CA]
12/30/08	Letter dated 12/29/08 from Seth P. Waxman, Esq., requesting that the case not be scheduled for oral argument on Friday, February 6, 2009. Mr. Waxman is available any other date that week and any day the following week, except Monday, February 9th, 2009. [Entry date Dec 30 2008] [JR]

DATE	PROCEEDINGS
12/31/08	Set for argument on 2/5/09 A Panel at 10am [Entry date Dec 31 2008] [DC]
	* * * * *
1/15/09	AMICUS CURIAE Parents Television Council, brief filed with proof of service. [Entry date Jan 15 2009] [JR]
	* * * * *
1/15/09	Order FILED GRANTING motion for leave to file brief for amicus curiae by Movant Parents Television Council, endorsed on motion dated 8/29/2008 [Entry date Jan 15 2009] [AV]
	* * * * *
2/5/09	Case heard before WESLEY, LIVINGSTON, C.JJ., RESTANI, USCIT [Entry date Feb 5 2009] [LY
	* * * * *
5/1/09	RESPONDENT Federal Communications Commission, 28(J) letter dated 4/30/09 FILED. [Entry date May 1 2009] [JR]
5/5/09	PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc, 28(J) letter dated 5/4/09 in response to Respondents' April 30 letter, FILED. [Entry date May 6 2009] [JR]

DATE	PROCEEDINGS
5/7/09	PETITIONER ABC Television Affliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, ET AL, 28(J) letter dated 5/6/09 from Mark J. Prak, Esq., in response the to the FCC's April 30, FILED. [Entry date May 8 2009] [JR]
5/7/09	RESPONDENT Federal Communications Commission, 28(J) letter dated 5/5/09 from Jacob M. Lewis, Esq., FILED. [Entry date May 8 2009] [JR]
	* * * * *
7/19/10	PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc, 28(J) letter FILED. [Entry date Jul 19 2010] [WD]
	* * * * *
7/21/10	RESPONDENT Federal Communications Commission, 28(J) letter FILED. [Entry date Jul 22 2010] [WD]

DATE	PROCEEDINGS
7/22/10	Order filed stating, IT IS HEREBY ORDERED THAT all parties, including amici curiae, shall file supplemental briefs with this Court by August 23, 2010, not to exceed fifteen double-spaced pages, regarding the impact of Fox Television Stations, Inc. v. FCC, F.3d, No. 06-1760-ag (L), et al., 2010 WL 2736937 (2d Cir, July 13, 2010) on th issues in this appeal. (RCW) [Entry date Jul 22 2010] [WD]
	* * * * *
8/23/10	AMICUS CURIAE Parents Television Council, supplemental brief filed with proof of service. [Entry date Aug 23 2010] [AJ]
8/23/10	AMICUS CURIAE Decency Enforcement Center For Television, supplemental brief filed with proof of service. [Entry date Aug 23 2010] [AJ]
8/23/10	INTERVENOR Fox Television Stations, Inc., supplemental brief filed with proof of service. [Entry date Aug 24 2010] [AJ]

DATE	PROCEEDINGS
8/23/10	PETITIONER ABC Television Affliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, ET AL, supplemental brief filed with proof of service. [Entry date Aug 24 2010] [AJ]
8/23/10	PETITIONER ABC Inc., KTRK Television, Inc., WLS Television, Inc, supplemental brief filed with proof of service. [Entry date Aug 24 2010] [AJ]
8/23/10	INTERVENOR CBS Broadcasting Inc., supplemental brief filed with proof of service. [Entry date Aug 24 2010] [AJ]
8/23/10	AMICUS CURIAE Morality In Media, Inc., supplemental brief filed with proof of service. [Entry date Aug 24 2010] [AJ]
8/23/10	RESPONDENT Federal Communications Commission, United States of America, supplemental brief filed with proof of service. [Entry date Aug 24 2010] [AJ]
8/23/10	Letter received from AMICUS CURIAE Center for Creative Voices in Media, Future of Music Coalition, re: advising the Court that they join in the arguments presented in the Supplemental Brief of Petitioners ABC, Inc., et al. [Entry date Aug 24 2010] [AJ]

DATE	PROCEEDINGS
	* * * * *
1/4/11	SUMMARY ORDER AND JUDGMENT, petition for review is granted and the forfeiture order of the FCC is vacated, FILED. (By: JAR., D. j.) [Entry date Jan 4 2011] [YS]
	* * * * *
2/25/11	Judgment MANDATE ISSUED. CLOSED [Entry date Feb 25 2011] [YS]
3/30/11	Notice from Supreme Court granting RESPONDENT Federal Communications Commission, extension of time in which to file a writ of certiorari. [Entry date Apr 1 2011] [YS]
4/22/11	Notice of filing petition dated 04/21/2011 filed. Supreme Court #: 10-1293. [Entry date May 2 2011] [YS]
6/27/11	Letter dated 06/27/2011 from the Supreme Court advising of order granting petition for writ of certiorari filed by Respondents Federal Communications Commission and United States of America, filed. (Supreme Court # 10-293) [Entry date Jul 1 2011] [YS]

DATE	PROCEEDINGS
6/27/11	Writ of Certiorari GRANTED. [Entry date Jul 2 2011] [YS]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 06-17

IN THE MATTER OF
COMPLAINTS REGARDING VARIOUS TELEVISION
BROADCASTS BETWEEN FEBRUARY 2, 2002 AND
MARCH 8, 2005

Adopted: Feb. 21, 2006
Released: Mar. 15, 2006

NOTICES OF APPARENT LIABILITY AND MEMORANDUM OPINION AND ORDER

By the Commission: Chairman Martin, Commissioners Copps and Tate issuing separate statements; Commissioner Adelstein concurring, dissenting in part and issuing a statement.

TABLE OF CONTENTS

Heading	Paragraph #
I. INTRODUCTION	1
II. BACKGROUND	8
III. DISCUSSION	22
A. Notices of Apparent Liability for Forfeiture	22
1. "The Surreal Life 2" (February 8, 2004)	22
2. "Con El Corazón En La Mano" (October 9, 2004)	33
3. "Fernando Hidalgo Show" (October 19, 2004)	43
4. "Video Musicales" (February 2-March 8, 2002)	52
5. "The Blues: Godfathers and Sons" (March 11, 2004)	72
6. "The Pursuit of D.B. Cooper" (March 15, 2003)	87
B. Indecent And/Or Profane Broadcasts But No Forfeiture Proposed	100
1. "The 2002 Billboard Music Awards" (December 9, 2002)	101
2. "The 2003 Billboard Music Awards" (December 10, 2003)	112
3. "NYPD Blue" (various dates between January 14 and May 6, 2003)	125
4. "The Early Show" (December 13, 2004)	137
C. Broadcasts That Do Not Violate Indecency/ Profanity/Obscenity Restrictions	146
1. "Alias" (January 5, 2005)	147

2. "Will and Grace" (November 11, 2004) .. 153
3. "Two and a Half Men" (February 21, 2005) 160
4. "Committed" (March 8, 2005) 163
5. "Golden Phoenix Hotel & Casino Commercial" (February 19, 2005) 166
6. "The Oprah Winfrey Show" (March 18, 2004) 173
7. Political Advertisement (October 14, 2004) 180
8. "The Amazing Race 6" (December 21, 2004) 188
9. Various Programs Containing Expletives (various dates between August 31, 2004 and February 28, 2005) 193
10. "Family Guy" (January 16, 2005) 200
11. "The Academy Awards" (February 27, 2005) 206
12. "8 Simple Rules" (February 4, 2005) 210
13. "The Today Show" (January 11, 2005) .. 213
14. "The Simpsons" (September 9, 2004) ... 219
15. "America's Funniest Home Videos" (February 5, 2005) 224
16. "Green Bay Packers v. Minnesota Vikings" (January 9, 2005) 227
17. "Medium" (January 17, 2005) 230

IV. ORDERING CLAUSES 233

I. INTRODUCTION

1. The Commission has regulated the broadcast of indecent programming for decades, and our authority in this area has long been upheld as constitutional by the U.S. Supreme Court. During the last few years, how-

ever, we have witnessed increasing public unease with the nature of broadcast material. In particular, Americans have become more concerned about the content of television programming, with the number of complaints annually received by the Commission rising from fewer than 50 in 2000 to approximately 1.4 million in 2004. At the same time, broadcasters have sought guidance from the Commission about our rules, arguing that they lack certainty regarding the meaning of our indecency and profanity standards. The decisions we issue today respond to both of these concerns.

2. In these decisions, we address hundreds of thousands of complaints alleging that various broadcast television programs aired between February 2002 and March 2005 are indecent, profane, and/or obscene. The cases we resolve today represent a broad range of factual patterns. Taken both individually and as a whole, we believe that they will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard. The cases also further refine our standard regarding the use of profane language in the broadcast medium and illustrate the types of language proscribed by that standard. Overall, the decisions demonstrate repeatedly that we must always look to the context in which words or images occur to determine whether they are indecent. In addition, while we find certain highly offensive language to be presumptively profane, we also take care to emphasize that such words may not be profane in specified contexts.

3. Section II below is devoted to providing a full description of the Commission's standards for analyzing whether programming is indecent and/or profane and

referencing the legal sources upon which these standards are based. In Section II, we also fully describe our methodology for calculating proposed forfeitures against broadcast licensees when there has been an apparent violation of our prohibitions against indecency and/or profanity.

4. In Section III, we apply these indecency and/or profanity standards to the complaints before us on a case-by-case basis. We begin with cases in which we have determined that the broadcast licensee apparently aired indecent and/or profane material and propose forfeitures against the licensee. The monetary forfeitures proposed demonstrate that the Commission will exercise its statutory authority to ensure that the broadcast of indecent and/or profane material will be appropriately sanctioned.

5. Section III next addresses cases in which we find the complained-of material indecent and/or profane but do not propose taking action against the licensee. In these cases, the licensee was not on notice at the time of the broadcast that we would deem the relevant material indecent or profane. For example, we hold that a single use of the word "shit" and its variants (the "S-Word") in the contexts presented is both indecent and profane. However, we do not propose adverse action in these cases because we have not previously announced this conclusion.

6. Section III concludes with a discussion of a number of cases in which we determine that various words, phrases, or scenes that occur in a variety of programs, while undoubtedly upsetting to some viewers, do not warrant action against the broadcast station licensee. We reach these determinations either because the

complained-of material is not within the scope of our indecency or profanity definitions or because, even if it is within the scope of our indecency definition, it is not, in the contexts before us, patently offensive as measured by contemporary community standards for the broadcast medium.

7. Together, these decisions demonstrate the Commission's strong commitment to fulfilling the responsibility vested in us by Congress within the parameters of the United States Constitution. We believe that issuing these decisions as a single order will enable broadcasters to better understand the boundaries of our indecency and profanity standards, while at the same time responding to the concerns expressed by hundreds of thousands of citizens in complaints filed with the Commission. In the end, our primary objective is to fulfill our statutory obligation to enforce the law in this area and to do so in a clear and consistent manner.

II. BACKGROUND

8. Section 1464 of title 18, United States Code, prohibits the broadcast of obscene, indecent, or profane programming.[1] The FCC rules implementing that statute, a subsequent statute establishing a "safe harbor" during certain hours, and the Communications Act of 1934, as amended (the "Act"), prohibit radio and television stations from broadcasting obscene material at any time and indecent material between 6 a.m. and 10 p.m.[2]

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[1] 18 U.S.C. § 1464.

[2] *See* 47 C.F.R. § 73.3999; *see also* Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (setting the safe harbor of 10 p.m. to 6 a.m. for the broadcast of indecent material); *see also Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995) (*en*

adcasters also may not air profane material during this time period.[3]

9. The federal prohibition against the broadcast of indecent and profane material is longstanding. In the Radio Act of 1927, Congress first provided that "[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."[4] This prohibition was then reenacted as part of the Act and was moved subsequently to title 18 of the United States Code in 1948.

10. ***Indecency Analysis.*** The federal courts have consistently upheld Congress's authority to regulate the broadcast of indecent material, as well as the Commission's interpretation and implementation of the governing statute. In 1978, the U.S. Supreme Court, in upholding the constitutionality of the prohibition against the broadcast of indecent material, concluded that "special treatment of indecent broadcasting" was appropriate. The Court noted that the Commission's authority to reg-

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banc) ("*ACT III*"), *cert. denied*, 516 U.S. 1072 (1996) (affirming restrictions prohibiting the broadcast of indecent material between the hours of 6 a.m. and 10 p.m.)

[3] *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order 18 FCC Rcd 19859 (Enf. Bur. 2004), *review granted*, 19 FCC Rcd 4975, 4981 ¶¶ 13 and 14 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending*. The Commission established a "safe harbor" period from 10 p.m. to 6 a.m. during which profane speech may be legally broadcast as a narrowly tailored means of vindicating its compelling interests in assisting parents and protecting minors, consistent with the D.C. Circuit's decision that the same "safe harbor" period for indecent material is consistent with the Constitution. *See ACT III*, 58 F.3d at 667.

[4] 44 Stat. 1172.

ulate indecent broadcast material is justified by two primary considerations, both of which are equally, if not more, applicable today. First, the broadcast media occupy "a uniquely pervasive presence in the lives of all Americans."[5] Indecent material "presented over the airwaves confronts the citizen, not only in public, but also in the privacy of their own home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[6] "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[7] Indeed, while the Supreme Court's observation regarding the pervasiveness of the broadcast media dates back to 1978, the ubiquity of television in the lives of Americans has only increased in the intervening 28 years. Second, the Supreme Court observed that "broadcasting is uniquely accessible to children, even those too young to read."[8] This finding is even more relevant today given the increased accessibility of the broadcast media to children.[9]

11. Enforcement of the provisions restricting the broadcast of indecent, obscene, or profane material is an important component of the Commission's overall responsibility over broadcast radio and television opera-

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[5] *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("*Pacifica*").

[6] *Id.*

[7] *Id.*

[8] *Id.* at 749.

[9] *See* Donald F. Roberts, Ulla G. Foehr, and Victoria Rideout, *Generation M: Media in the Lives of 8-18 Year Olds* (March 2005) at 12-13 (finding that 99% of children 8-18 have a television set in their home and that 68% of children 8-18 have a television set in their bedroom).

tions. At the same time, however, the Commission must be mindful of the First Amendment to the United States Constitution and section 326 of the Act, which prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights.[10] As such, in making indecency determinations, the Commission proceeds cautiously and with appropriate restraint.[11]

12. The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.[12]

> Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently*

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[10] U.S. CONST., amend. I; 47 U.S.C. § 326. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

[11] *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1344, 1340 n. 14 (1988) (*"ACT I"*) (stating that "[b]roadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear," and that any "potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

[12] *See Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. Pacifica*, 438 U.S. 726).

offensive as measured by contemporary community standards for the broadcast medium.[13]

13. In our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."[14] Three prin-

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[13] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 ¶¶ 7-8 (2001) ("*Indecency Policy Statement*") (emphasis in original). In applying the "community standards for the broadcast medium" criterion, the Commission has stated:

> The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.

WPBN/WTOM License Subsidiary, Inc., Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841 ¶ 10 (2000) ("*WPBN/WTOM MO&O*"). The Commission's interpretation of the term "contemporary community standards" flows from its analysis of the definition of that term set forth in the Supreme Court's decision in *Hamling v. United States*, 418 U.S. 87 (1974), *reh'g denied*, 419 U.S. 885 (1974). In *Infinity Broadcasting Corporation of Pennsylvania (WYSP(FM))*, Memorandum Opinion and Order, 3 FCC Rcd 930 (1987) (subsequent history omitted), the Commission observed that in *Hamling*, which involved obscenity, "the Court explained that the purpose of 'contemporary community standards' was to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Id.* at 933 (citing 418 U.S. at 107). The Commission also relied on the fact that the Court in *Hamling* indicated that decisionmakers need not use any precise geographic area in evaluating material. *Id.* at 933 (citing 418 U.S. at 104-05). Consistent with *Hamling*, the Commission concluded that its evaluation of allegedly indecent material is "not one based on a local standard, but one based on a broader standard for broadcasting generally." *Id.* at 933.

[14] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

cipal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.[15] In examining these three factors, we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly, other factors."[16] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[17] or, alternatively, removing the broadcast material from the realm of indecency.

14. In each of the cases below in which the complaint alleges indecency, we apply the two-pronged indecency analysis described above. Specifically, we first determine whether the complained-of material is within the scope of our indecency definition; *i.e.*, whether it describes or depicts sexual or excretory activities or organs. If so, we then turn to the three principal factors of the second prong to determine whether, taken in context, the material is patently offensive as measured by

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[15] *Id.* at 8002-15 ¶¶ 8-23.

[16] *Id.* at 8003 ¶ 10.

[17] *Id.* at 8009 ¶ 19 (*citing Tempe Radio, Inc (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid), and *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (finding that the extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references).

contemporary community standards for the broadcast medium.

15. As evidenced below, our contextual analysis takes into account the manner and purpose of broadcast material.[18] For example, material that panders to, titillates, or shocks the audience is treated quite differently than material that is primarily used to educate or inform the audience. In particular, we recognize the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee.[19]

16. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, we concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it involved vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[20] We indicated in that decision that we would analyze other potentially profane words on a case-by-case basis.

17. Just as with indecent broadcasting, we are mindful that, in exercising our statutory authority over

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[18] *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 20 (noting that "the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

[19] *See Syracuse Peace Council*, Memorandum Opinion and Order, 2 FCC Rcd 5043, 5050-51 ¶ 52 (1987) (subsequent history omitted) (eliminating the fairness doctrine, which placed an affirmative obligation on broadcasters to cover, and present contrasting viewpoints on, controversial issues of public importance).

[20] 19 FCC Rcd at 4981 ¶ 13.

profane broadcast material, we must proceed with "due respect for the high value our Constitution places on freedom and choice in what the people say and hear."[21] In the *Golden Globe Awards Order*, we interpreted profanity, citing a decision by the U.S. Court of Appeals for the Seventh Circuit, as "denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[22] In the context of broadcasting, however, it is not clear whether the "fighting words" portion of this definition applies. Given the nature of television and radio, it appears unlikely that broadcast material would provoke immediate violence between those uttering such words and the audience. Therefore, in the cases below, and as a general matter, we will analyze potentially profane language with respect to whether it is "so grossly offensive as to constitute a nuisance."

18. Additionally, given the sensitive First Amendment implications in this area, we establish a presumption that our regulation of profane language will be limited to the universe of words that are sexual or excretory in nature or are derived from such terms. As our regulation of profane language is based on a nuisance rationale similar to that which forms the basis for indecency regulation, we believe that the same limitation on the scope of our regulation is appropriate and rests upon

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[21] *ACT I*, 852 F.2d at 1344 (noting that "the potentially chilling effect of the FCC's generic definition will be tempered by the Commission's restrained enforcement policy.").

[22] 19 FCC Rcd at 1980 ¶ 12.

sound constitutional footing.[23] Although we recognize that additional words, such as language conveying racial or religious epithets, are considered offensive by most Americans, we intend to avoid extending the bounds of profanity to reach such language given constitutional considerations.[24]

19. We conclude below that certain vulgar sexual or excretory terms are so grossly offensive to members of the public that they amount to a nuisance and are presumptively profane. We reserve that distinction for the most offensive words in the English language, the broadcast of which are likely to shock the viewer and disturb the peace and quiet of the home. We also note, however, that in rare cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[25] As detailed below, we caution that we will find this exception to be applicable only in unusual circumstances.

20. ***Forfeiture Calculations.*** The *Notices of Apparent Liability for Forfeiture* ("*NALs*") contained in this decision are issued pursuant to section 503(b)(1) of the

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[23] *See Pacifica*, 438 U.S. at 748-751; *Golden Globe Awards Order*, 19 FCC Rcd at 4981-82 ¶¶ 13-16.

[24] *See, e.g., Raycom America, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 4186, 4187, ¶¶ 3-4 (2003); *Complaint of Julian Bond, Atlanta NAACP*, Letter, 69 FCC 2d 943 (Broadcast Bur. 1978).

[25] *See Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005) ("*Saving Private Ryan*").

Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission or to have violated section 1464 of title 18, United States Code, shall be liable to the United States for a forfeiture penalty.[26] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[27] The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act,[28] and the Commission has so interpreted the term in the section 503(b) context.[29] The term "repeated" means that the action was committed or omitted more than once, or lasts more than one day.[30] We emphasize that every licensee is responsible for the decision to air particular programming and will be held accountable for violating federal restrictions on the willful or repeated broadcast of obscene, indecent, or profane material.

21. The Commission's *Forfeiture Policy Statement* establishes a base forfeiture amount of $7,000 for the transmission of indecent or obscene materials.[31] The

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[26] 47 U.S.C. § 503(b)(1)(B) & D. *See also* 47 C.F.R. 1.80(a)(1).

[27] 47 U.S.C. § 312(f)(1).

[28] *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

[29] *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

[30] *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 9 (2001).

[31] *See Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997), *recon. denied*, 15

Forfeiture Policy Statement also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[32] For the cases in this decision, the statutory maximum forfeiture amount for each apparent violation occurring prior to September 7, 2004 was $27,500.[33] The statutory maximum forfeiture amount for violations discussed in this decision occurring on or after September 7, 2004 is $32,500.[34] Consistent with the *Forfeiture Policy Statement*, we calculate forfeiture amounts by: (1) determining whether to use the base statutory amount, the maximum statutory amount, or a different figure below the statutory maximum based upon consideration of the factors enumerated in section 503(b)(2)(D); and (2) multiplying that figure by the number of violations. Where repeated violations have occurred but the resulting total forfeiture amount would be excessive to achieve the appropriate level of punishment and deterrence, we also may adjust the total proposed forfeiture according to the stated statutory factors.

FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); *see also* 47 C.F.R. § 1.80(b).

[32] *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01 ¶ 27.

[33] Effective September 7, 2004, the Commission amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. *See Amendment of Section 1.80 of the Commission's Rules*, Order, 19 FCC Rcd 10945, 10946 ¶ 6 (2004).

[34] *Id.*

III. DISCUSSION

A. Notices of Apparent Liability for Forfeiture

1. "The Surreal Life 2" (February 8, 2004)[35]

22. ***The Programming.*** The Commission received a complaint alleging that WBDC Broadcasting, Inc. ("WBDC Broadcasting"), licensee of Station WBDC-TV, Washington, D.C.,[36] and other station affiliates of the WB Television Network (the "WB Network"), broadcast indecent material during the *Pool Party Episode* of the program "The Surreal Life 2" on February 8, 2004, at 9:00 p.m. Eastern Standard Time. On September 27, 2004, the Bureau sent a letter of inquiry to the WB Network concerning this and other episodes of "The Surreal Life 2."[37] In response to the letter of inquiry, the WB Network stated, *inter alia*, that Station WBDC-TV aired the complained-of episode on February 8, 2004 at 9:00 p.m. Eastern Standard Time.[38]

[35] FCC File No. EB-04-IH-0166.

[36] *See* Letter from Lara Mahaney, Parents Television Council, to David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 17, 2004). In its complaint, PTC incorrectly states that the call sign of the station is "KBDC-TV," but it appears that the complained-of station is Station WBDC-TV based on our review of the videotape of the program provided by PTC.

[37] *See* Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to John Maatta, Executive Vice-President and General Counsel, The WB Television Network (September 27, 2004).

[38] *See* Letter from Arthur H. Harding, Esquire, Fleischman and Walsh, L.L.P., counsel for The WB Television Network, to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (October 6, 2004) ("October Response"); Letter from Arthur H. Harding, Esquire,

23. "The Surreal Life 2" is a "reality-based" television program in which six cast members from diverse backgrounds share a luxurious house for 12 days. One of the six cast members, Ron Jeremy, is a veteran actor in pornographic movies. In the *Pool Party Episode*, he gives a pool party for about twenty of his friends in the pornographic movie industry. During the ten-minute sequence depicting this party, the episode displays approximately 20 pixilated views of various female guests' nude breasts and, in one case, a female guest's entire nude body. In addition, there are numerous other examples of sexual images and innuendo, including two brief, pixilated scenes in which Mr. Jeremy touches or kisses a female guest's bare breast; a scene in which Andy Dick, another guest at the party, places his mouth on the top portion of a female cast member's breast and makes a comic sound, and the female cast member explains that they are just friends; another scene in which Andy Dick kisses a female guest's pixilated bare breast and spanks her buttocks, stating jestingly that she should go to her room and he'll join her there shortly; a scene where a female guest appears to sexually proposition a male cast member;[39] and a scene in which another female cast

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Fleischmann and Walsh, L.L.P., counsel for the WB Television Network, to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (November 1, 2004).

[39] In this scene, program participant Erik Estrada says that one of the female guests propositioned him with "an oral compliment." The camera then turns to a scene where the female guest in question says to Mr. Estrada: "Wanna come inside [bleep]." Mr. Estrada responds with a shocked facial expression. The camera then turns to a scene in which he says into the camera: "And I said 'ah you're very kind and generous, but you know what? I'm a married man.'"

member suggests that the party attendees play a game of "strip truth or dare to get naked," saying to Ron Jeremy, "[c]ome on porn star, everyone knows about your big [bleep], though I haven't seen it."

24. ***Indecency Analysis.*** We find that the material meets the first prong of the indecency test. As noted above, the episode contains several pixilated views of nude breasts and a nude body, as well as other sexual images and innuendo described above.[40] All of this material depicts or describes sexual activities and organs.

25. Moving to the second prong of our indecency test, we also find that the material is, in the context presented here, patently offensive as measured by contemporary community standards for the broadcast medium. The first of the three principal factors in our contextual analysis weighs in favor of a finding of patent offensiveness because the material is explicit and graphic. In this regard, the mere pixilation of sexual organs is not necessarily determinative under our analysis because the material must be assessed in its full context.[41] Here, despite the obscured nature of the nudity, it is unmistakable that partygoers are exposing and discussing sexual organs as well as participating in sexual activities, such as when Mr. Jeremy touches or kisses an unclothed female breast. Indeed, a child watching this program could easily discern that nude or partially nude adults

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[40] *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20194 ¶ 10 (2004) (*"Married By America NAL"*) (program featuring bachelor and bachelorette parties with pixilated nudity of professional strippers met first prong of indecency standard).

[41] *Id.*

are attending a party and participating in, or soliciting participation in, sexual activities.[42] We, therefore, find that the complained-of material is explicit and graphic.

26. With respect to the second prong of our contextual analysis, we find that the broadcast dwells on and repeats the sexual material. We have repeatedly held that repetition and persistent focus on sexual or excretory material is a relevant factor in evaluating the potential offensiveness of broadcasts.[43] In this case, the presentation of approximately 20 views of pixilated female nudity within a ten-minute segment, together with other depictions or descriptions of sexual organs or activities during the same episode, demonstrates that this episode dwells upon and repeats sexual material.

27. Looking to the final prong of our test, we conclude that the broadcast material is presented in a manner that panders to, titillates, and shocks the audience. Among other things, the material depicts male cast members and party guests ogling, fondling, and kissing female party guests' bare breasts, a male party guest spanking a female guest's buttocks and placing his lips on a female cast member's breast, a female party guest sexually propositioning a male cast member, and a male and female cast member attempting to goad one another into disrobing, with the female cast member proposing a game of "strip truth or dare to get naked." The strong

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[42] *Id.* (finding that "although the nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown.").

[43] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); *see also Married by America NAL*, 19 FCC Rcd at 20195 ¶ 11;; *Entercom Seattle License, LLC*, Order on Review, 19 FCC Rcd 9069, 9073-74 ¶ 13 (2004) ("*Entercom Seattle Order on Review*"), *petition for recon. pending*.

emphasis on the fact that some female party guests are pornographic film stars also panders to the audience.

28. In reaching our determination, we disagree with WB Network's contention that "these isolated scenes contain no graphic depictions or profanity that might rise to the level of actionable indecency."[44] In support of its argument, WB Network cites the *KSAZ MO&O* and the *Buffy the Vampire Slayer MO&O* in which we denied indecency complaints. Both of these cases, however, are distinguishable from the *Pool Party Episode* of the "The Surreal Life 2." Each of those cases involved two fully clothed adults, and the individual scenes involved were less graphic, explicit, and sustained than the complained-of material here.

29. In sum, because the material is explicit and graphic, is dwelled upon, and presented in a manner to titillate and shock viewers, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[45] Therefore, there is a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

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[44] October Response at 2 (citing *KSAZ Licenses, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 15999 (2004) ("*KSAZ MO&O*") and *Complaints Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" On November 20, 2001*, Memorandum Opinion and Order, 19 FCC Rcd 15995 (2004) ("*Buffy the Vampire Slayer MO&O*")).

[45] *See* 47 C.F.R. § 73.3999.

30. ***Forfeiture Calculation.*** In the instant case, WBDC Broadcasting consciously and deliberately broadcast this episode. Accordingly, we find that WBDC Broadcasting's broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.

31. Based on the egregious nature of the broadcast material at issue, and the factors enumerated in section 503(b)(2)(D) of the Act, we further find that a forfeiture amount of $27,500, the statutory maximum in effect at the time of the broadcasts, is appropriate.[46] The gravity of the apparent violation is heightened by the degree to which the scene dwells on and repeats sexual material in a manner that titillates and shocks viewers. The scene lasts for over ten minutes, contains approximately twenty pixilated images of nude adults, including a fully nude body, and focuses almost entirely on men and women disrobing, ogling, fondling, kissing, and sexually propositioning one another during a pool party. Moreover, the *Pool Party Episode* of "The Surreal Life 2" is a taped program with an obvious sexual theme that could have been ascertained and preempted by the licensee or shown after 10 p.m.

32. Although other stations also may have broadcast the *Pool Party Episode*, we propose a forfeiture only against WBDC Broadcasting, Inc. as the only licensee whose broadcast of the material was actually the subject

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[46] The subject broadcast occurred prior to the September 7, 2004, effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $27,500. *See supra* ¶ 21.

of a viewer complaint to the Commission.[47] We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.[48] Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties.[49] Accordingly, we propose a forfeiture of $27,500 against WBDC Broadcasting, Inc.

2. "Con El Corazón En La Mano" (October 9, 2004)[50]

33. ***The Programming.*** The Commission received a complaint alleging that NBC Telemundo License Co. ("NBC Telemundo"), licensee of Station KWHY-TV, Los

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[47] The fact that WBDC may not have originated the programming in question is irrelevant to whether there is an indecency violation. *See Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, Notice of Proposed Rulemaking, 10 FCC Rcd 11951,11961, ¶ 20 (1995) (internal quotation omitted) ("We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.").

[48] *See Married By America NAL*, 19 FCC Rcd at 20196 ¶ 16 (proposing forfeitures against all Fox Television Network affiliate stations that broadcast apparently indecent material). *See also Clear Channel Broadcasting Licenses, Inc. et al.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 6773, 6779 ¶ 16 (2004) (proposing forfeiture against all commonly owned and operated stations that broadcast the programming at issue, and directing an investigation into stations owned by another licensee that broadcast the same program), *vacated per consent decree*, 19 FCC Rcd 10880 (2004).

[49] *See supra* ¶ 11 and note 11.

[50] FCC File No. EB-04-IH-0572.

Angeles, California, aired indecent material at approximately 8:15 p.m. on October 9, 2004, during a broadcast of the Spanish-language movie, "Con El Corazon En La Mano." The complaint alleged that the broadcast contains a scene depicting a man and woman engaged in sexual intercourse while another individual watches them.

34. On April 8, 2005, the Bureau directed a letter of inquiry to NBC Telemundo concerning the broadcast.[51] NBC Telemundo responded by letters dated May 19 and June 24, 2005.[52] As confirmed by a videotape of the program provided by NBC Telemundo, the scene in question depicts a man raping a woman in a public restroom while another man stands nearby, acting as a lookout. NBC Telemundo acknowledges that it aired the movie over Station KWHY-TV, Los Angeles, California, beginning at 8:00 p.m. on October 9, 2004, and that the scene took place within the first 15 minutes of the broadcast.[53] NBC Telemundo maintains, however, that "the complained-of material is not actionably indecent because it does not include depictions of nude sexual or excretory

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[51] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to NBC Telemundo License Co. (April 8, 2005).

[52] *See* Letter from F. William LeBeau, Senior Regulatory Counsel and Assistant Secretary, NBC Telemundo License Co., to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (May 19, 2005) ("Response"); Letter from F. William LeBeau, Senior Regulatory Counsel and Assistant Secretary, NBC Telemundo License Co., to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (June 24, 2005).

[53] Response at 2-3.

organs, offensive language or other material that the Commission previously has deemed indecent."[54]

35. ***Indecency Analysis.*** We find that the programming at issue is within the scope of our indecency definition because it clearly depicts sexual activity. NBC Telemundo does not deny that the material portrays a woman being raped.

36. We also find that the complained-of material is, in the context presented, patently offensive as measured by contemporary community standards for the broadcast medium. Turning to the three principal factors that inform our contextual analysis, the scene is explicit and graphic. The material depicts a woman being savagely attacked and raped in a public restroom. One man grabs the woman and forcibly kisses her as she struggles to free herself. He strikes her to the floor and, kneeling down, grabs one of her breasts as she screams. As they struggle together on the floor, the camera focuses on their hips, showing his hand pulling her underwear down her bare thigh as he maneuvers on top of her with his groin between her legs. She forces him off her by grabbing his testicles, but the other man blocks her escape from the room, and the first man again pulls her to the floor, re-mounts her and begins kissing her. She appears to cease resisting and returns his kisses. The camera again pans to their hips, showing his hand fumbling at his zipper. They quite clearly appear to have sexual intercourse, with his groin thrusting into hers as she moans, until he finally stops and rolls off of her. The scene then continues for several minutes, depicting her reaction to the attack. The material by its very design

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[54] *Id.* at 2.

is extraordinarily intense and extremely graphic. We reject NBC Telemundo's claim that the material is neither explicit nor graphic simply because it contained no actual nudity. For example, in the *Married By America NAL*, we found that scenes in which nudity is electronically obscured may be considered graphic and explicit if the sexual nature of the scene is unmistakable.[55] In this case, the sexual nature of the scene is unquestionable, and the material is undeniably graphic, notwithstanding the lack of nudity.

37. Moving to the second factor in our contextual analysis, we conclude that the broadcast dwells on sexual material. We have repeatedly held that a persistent focus on sexual material is a relevant factor in evaluating the potential offensiveness of broadcasts.[56] The rape scene in question lasts several minutes and, contrary to NBC Telemundo's claim, is hardly ephemeral. As we stated in the *Indecency Policy Statement*, "[r]epetition and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts."[57]

38. With respect to the third factor, we find the material to be shocking. In this regard, NBC Telemundo

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[55] 19 FCC Rcd at 20194 ¶ 10. *See also Back Bay Broadcasting*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 3997, 3998 (Mass Media Bur. 1999) ("*Back Bay NAL*") (forfeiture paid) (finding broadcast indecent despite attempt to obscure objectionable language because words remained clearly "recognizable, notwithstanding the editing").

[56] *See Indecency Policy Statement*, 16 FCC Rcd at 8008, ¶ 17 (citing cases); *see also "Married By America" NAL*, 19 FCC Rcd at 20195 ¶ 11; *Enterrom Seattle Order on Review*, 19 FCC Rcd at 9073-74 ¶ 13.

[57] 16 FCC Rcd at 8008 ¶ 17.

concedes that the rape scene was designed to portray the "intensity of [a] serious and unspeakable event. . . ."[58] We agree. Not only does the scene portray an "unspeakable" event of a profoundly disturbing sexual and violent nature, it depicts an incident that was unquestionably shocking and one to which children should not have been exposed. We reject NBC Telemundo's argument that the instant case is indistinguishable from *Saving Private Ryan*,[59] wherein we determined that graphic language throughout the movie was critical to portraying serious events realistically.[60] NBC Telemundo has not demonstrated here that the depiction of a woman being violently raped in such a sustained and graphic manner is essential. In any event, even if these aspects of the scene were essential to the movie, that finding would not alter our ultimate conclusion in this case because the other two factors weigh heavily in favor of a finding of patent offensiveness as measured by contemporary community standards for the broadcast medium. We also do not find that NBC Telemundo's parental advisory prior to its broadcast of "Con El Corazon En La Mano" insulates the licensee from liability.[61]

39. In sum, because the material is explicit and graphic, is dwelled upon, and is shocking, we conclude that its broadcast was patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time

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[58] Response at 8.

[59] *Id.* at 7-8.

[60] *Saving Private Ryan*, 20 FCC Rcd at 4512-13, ¶ 14.

[61] *See Pacifica*, 438 U.S. at 748-49 (holding that warnings are not necessarily effective because the audience is constantly changing stations).

frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[62] Therefore, there was a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

40. ***Forfeiture Calculation.*** In the instant case, we find that NBC Telemundo consciously and deliberately broadcast the film in question. Accordingly, we find that NBC Telemundo's apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.

41. We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case. We find that the statutory maximum, $32,500,[63] is appropriate for several reasons. As discussed in detail above, the scene is extremely shocking, depicting a violent rape in a graphic and sustained manner. Also, the broadcast was prerecorded. NBC Telemundo knew that the film contained this material and should have taken efforts to edit the scene. Indeed, NBC Telemundo did include a warning of the upcoming scene. Although inclusion of a warning might warrant a lower forfeiture under certain circumstances, we find that it does not here in light of all of the circumstances surrounding the apparent violation, including the shocking and gratuitous nature of the scene and the fact that

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[62] *See* 47 C.F.R. § 73.3999.

[63] The subject broadcast occurred after the September 7, 2004, effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $32,500. *See supra* ¶ 21.

it was prerecorded. Therefore, we find that NBC Telemundo is apparently liable for a forfeiture of $32,500 for its October 9, 2004 broadcast of "Con El Corazon En La Mano."

42. Although other stations may have broadcast the material at issue here between 6 a.m. and 10 p.m., we propose a forfeiture against only the licensee and station whose broadcast of the material was actually the subject of a viewer complaint to the Commission. We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.[64] Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties.[65]

3. "Fernando Hidalgo Show" (October 19, 2004)[66]

43. ***The Programming.*** The Commission received a complaint alleging that Station WJAN-CA, Miami, Florida, aired indecent material during the October 19, 2004 broadcast of the program the "Fernando Hidalgo Show," a Spanish-language talk show. The complaint refers to a segment that involved partial female adult nudity. The segment was more than fifteen minutes in duration.

44. On February 11, 2005, the Bureau sent a letter of inquiry to Sherjan Broadcasting Company, Inc., the licensee of Station WJAN-CA, concerning the material described above allegedly broadcast over the station.[67]

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[64] *See supra* note 48.

[65] *See supra* ¶ 11 and note 11.

[66] FCC File No. EB-04-IH-0625.

[67] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communi-

Sherjan responded by letter dated March 14, 2005.[68] As confirmed by the videotape of the program provided by Sherjan, during the segment in question, the host introduces a female guest by stating, "before we present Juliana I want to tell the gentlemen to be careful because she is dressed in a way that can cause a heart attack."[69] The female guest then appears in an open-front dress, with her nipples covered, but her breasts otherwise fully exposed. As she makes her entrance, she pirouettes in front of the audience, then shakes her breasts towards the cameras. When she turns to face the host, he briefly stares at her breasts, then mugs for the camera. Sherjan acknowledges that the material in question was aired over Station WJAN-CA at 7:00 p.m. on October 19, 2004, and that the female guest appeared in an open-front dress.[70] However, Sherjan maintains that the complained-of material is not actionably indecent because it is "a comedy routine" and does not shock or titillate.[71]

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cations Commission, to Sherjan Broadcasting Company, Inc. (February 11, 2005) ("LOI").

[68] *See* Letter from Peter Tannenwald, Irwin, Campbell & Tannenwald, P.C., to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (March 14, 2005).

[69] *Id.* at Attachment 2 (licensee's English-language translation of broadcast). Also according to the licensee's translation, immediately before the woman appears on stage, the host asks another guest, "Do you know Juliana?" The guest states that she knows "Juliana How Bad You Are," a popular Spanish-language song. The host replies, "Well this one is worse than that! And we're going to present her now!" *Id.*

[70] *Id.*

[71] *Id.* at 2

45. ***Indecency Analysis.*** We find that the programming at issue is within the scope of our indecency definition because it depicts sexual organs—specifically an adult woman's breasts. Sherjan argues that the complained-of material "did not include any description of sexual or excretory functions in either the video or audio portion, let alone graphic descriptions."[72] However, the indecency definition clearly encompasses depictions of sexual organs as well as sexual activities.[73] Moreover, the explicitness of the depiction is not relevant to the threshold issue of whether the material depicts or describes a sexual or excretory organ or activity, and is more appropriately considered in our analysis of whether the material is patently offensive.

46. Turning to that issue, we find that, based on our contextual analysis, the material in question is patently offensive as measured by contemporary community standards for the broadcast medium. With respect to the first factor of our contextual analysis, we find that the material is explicit and graphic. The material clearly depicts a woman's naked breasts, which are sexual organs. In this respect, this case is similar to other cases in which we have held depictions of nudity to be graphic and explicit.[74] The fact that the guest's nipples

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[72] *Id.* at 1-2.

[73] *See, e.g., Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19235 ¶ 11 (2004) ("*Super Bowl NAL*") (finding that Super Bowl halftime show, which displayed a bare female breast, satisfied subject matter prong of indecency analysis).

[74] *Id.*, 19 FCC Rcd at 19235 ¶ 13 (finding that a broadcast, which showed a performer's exposed breast, was graphic and explicit). *See also Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Lia-

are covered with jewelry does not render the depiction of her breasts, which were otherwise fully exposed, insufficiently graphic to weigh in favor of a finding of patent offensiveness.[75] Here, the audience had a sustained view of the guest's breasts from several different angles, and the dress only served to enhance the view.

47. With respect to the second factor of our analysis, we find that the broadcast dwells on the sexual material. The guest's naked breasts are visible throughout much of the segment in question, which lasts more than fifteen minutes.[76] Furthermore, the camera focuses on the female guest's torso during much of that time. We have repeatedly held that repetition and persistent focus on sexual or excretory material is a relevant factor in evaluating the offensiveness of broadcasts.[77]

48. With respect to the third factor, we find that the female guest's partial nudity shocked, pandered to, and titillated the audience. Indeed, the behavior of the guest and the host as she came on stage highlighted the titillating nature of the material. Finally, we reject the licensee's contention that the material broadcast is not indecent because it is "a comedy routine." Even if this

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bility for Forfeiture, 19 FCC Rcd 1751, 1755 ¶ 11 (2004) ("*Young Broadcasting NAL*") (finding that a broadcast of performer's exposed penis was graphic and explicit).

[75] *See Super Bowl NAL*, 19 FCC Rcd at 19235-36, ¶ 13 (finding that a broadcast of performer's exposed breast was "clearly graphic," even though breast was partially covered).

[76] In this connection, we note that in the *Super Bowl NAL*, we found that the broadcast of an exposed breast was indecent, even though it lasted less than one second. *Id.*

[77] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); *see also Married By America NAL*, 19 FCC Rcd at 20195 ¶ 11; *Entercom Seattle Order on Review*, 19 FCC Rcd at 9073-74 ¶ 13.

segment was comedic, it is well settled that comedy formats do not insulate otherwise indecent material.[78]

49. In sum, we find that the broadcast material referenced in the complaint contains an explicit and graphic depiction of sexual organs, and that the nudity is dwelled upon and shocked, pandered to, and titillated the audience. Therefore, we find that the material is patently offensive as measured by contemporary community standards for the broadcast medium and is apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[79] Therefore, there is a reasonable risk that children may have been in the viewing audience at the time that the material at issue was broadcast, and the broadcast is legally actionable.

50. ***Forfeiture Calculation.*** In the instant case, Sherjan consciously and deliberately aired the "Fernando Hidalgo Show." By airing the complained-of material, we find that Sherjan's apparent violation of section 73.3999 and 18 U.S.C. § 1464 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.

51. We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case. For the following reasons, we propose a forfeiture of $32,500, the statutory maximum, for this

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[78] *See Pacifica*, 438 U.S. at 744 (upholding the Commission's finding that the broadcast of a comedy monologue featuring references to sexual activities and organs was patently offensive and violated the statutory prohibition on indecency).

[79] *See* 47 C.F.R. § 73.3999.

broadcast.[80] The scene is sustained, lasting 15 minutes, and contains no warning of the adult-oriented content. In addition, the gravity of the apparent violation is heightened because of its egregious nature. Thus we find Sherjan Broadcasting Company, Inc. is apparently liable for a forfeiture of $32,500 for its October 19, 2004 broadcast of the "Fernando Hidalgo Show."

4. "Video Musicales" (February 2 - March 8, 2002)

52. ***The Programming.*** The Commission received a series of written complaints from individuals associated with the group D'Vanguardia ("Complainants") alleging that Aerco Broadcasting Corp. ("Aerco"), licensee of Station WSJU-TV, San Juan, Puerto Rico, repeatedly broadcast indecent material between the hours of 6:00 a.m. and 10:00 p.m. during the "Video Musicales" program in early 2002.[81] After reviewing the complaints and videotapes provided by the Complainants, the Bureau directed a letter of inquiry to Aerco requesting fur-

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[80] The subject broadcast occurred after the September 7, 2004 effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $32,500. *See supra* ¶ 21.

[81] *See* Letter from David Ramos and Gloria Cardona, D'Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (March 12, 2002); Letter from David Ramos and Gloria Cardona, D'Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (March 2, 2002); Letter from David Ramos and Gloria Cardona, D'Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 26, 2002); Letter from David Ramos to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 26, 2002); Letter from Gloria Cardona and David Ramos, D'Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 22, 2002).

ther information about the music videos that Station WSJU-TV allegedly broadcast,[82] specifically including "DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan,"[83] "DJ Joe, Fatal Fantasy 2—Feat, Nejo, Speedy,"[84] "Operation Sandunga,"[85] and a promotional spot for a DVD entitled "Dangerous—Fatal Fantasy 2."[86]

53. Aerco responded to the Bureau's letter on March 23, 2004, providing a Spanish transcription and English translation of each of the music videos and other material.[87] Aerco states that it is not able to confirm whether it broadcast some of the material at the times and dates provided in the complaints and whether the music videos and other material on the videotape provided by the Complainants accurately reflect Station WSJU-TV's broadcasts.[88] However, Aerco did not pro

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[82] See Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, to Aerco (December 24, 2003) ("LOI").

[83] FCC File Nos. EB-02-IH-0167, EB-02-IH-0198.

[84] FCC File Nos. EB-02-IH-0167, EB-02-IH-0199.

[85] FCC File Nos. EB-02-IH-0167, EB-02-IH-0199.

[86] FCC File No. EB-02-IH-0258.

[87] *See* Letter from John A. Borsari to Marlene H. Dortch, Secretary, Federal Communications Commission at Exhibits 1-A—6-B (March 23, 2004) ("Response").

[88] *Id.* at 1-5. Aerco states that several music videos, all entitled "Fatal Fantasy 2," were broadcast between January and March 2002. Thus, Aerco claims it cannot confirm the dates and times for the airing of the specific videos "DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan" or "DJ Joe—Fatal Fantasy 2." *Id.* at 2-3. In regard to "Operation Sandunga," Aerco states that it does not have any records of such a titled music video. *Id.* at 4. It asserts that Aerco broadcasts programs produced by independent producers after 10:00 p.m. and some of these broadcasts contain music videos that would not be reflected in Aerco's

vide any documentation that challenged or raised questions about any of the complaints or videotapes made by the Complainants. Aerco also did not provide a complete record of its program logs for the dates alleged in the complaints.[89]

54. Aerco asserts that it is not aware of any other complaints about the material in question and thus contends that each of the complaints represents only a single viewer who objects to the broadcast matter.[90] In addition, Aerco asserts that, in many instances, significant portions of the material are inaudible and thus an ordinary viewer would be not be able to understand the lyrics. Aerco explains that it hired an independent firm to prepare the transcript to respond to the Bureau's LOI, which isolated the music portion from the speaking portion to identify the lyrics.[91] Aerco asserts that the lyrics

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program logs. *Id.* at 4-5. Aerco further asserts that since these broadcasts are aired after 10:00 p.m., "Operation Sandunga" could not have been broadcast between 10:00 a.m. and 10:52 a.m., as alleged in the complaints. *Id.* at 5. Aerco confirms that it broadcast the promo for "Dangerous—Fatal Fantasy 2" on the four dates alleged in the Bureau LOI, but is unable to confirm the broadcast times. *Id.* at 4.

[90] *Id.* at Exhibit 7. In response to the Bureau LOI, Aerco provided a program log for only one of the nine days mentioned in the complaints. Aerco also provided program logs for multiple days not mentioned in the Bureau LOI. The program logs list dates and times of program material, but provide only partial titles of the music videos played. Thus, there are multiple entries for a program entitled "Fatal Fantasy," which could be any of three videos discussed in this *Notice of Apparent Liability*. Because of the confusing nature of Aerco's program logs and the fact that Aerco does not dispute the times and dates listed in the videotapes provided by the Complainants, we will rely only on the videotapes as the basis for the proposed forfeiture here.

[91] *Id.* at 8.

[91] *Id.* at 8-9.

do not contain offensive or indecent language and that there were no nude scenes that would satisfy the Commission's standards for the definition of indecency.[92] Aerco concedes that some of the material is suggestive, but that any "sexual or excretory import to the innuendo or artistic license taken by the performers is subject to individual interpretation and to be categorized as indecent, and not merely poor taste, such innuendo must be unmistakable."[93]

55. *"DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan."* This song repeatedly mentions the singer's near-constant state of sexual arousal. There is a segment of the video in which a boy appears to masturbate in a bathroom stall. The lyrics accompanying the segment translate as follows:

> When I had been barely born, I instantly knew where I had come from. Since then until I grew up, I have always yearned to be inside a similar hole. In elementary school they called me Mr. Corner. In intermediate school they called me "little masturbator" because this is where my vice of rubbing myself incessantly began.[94]

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[92] *Id.* at 9-10.

[93] *Id.* at 10.

[94] This translation is based upon our review of the material at issue. Aerco provides the following translation (the parenthetical is in Aerco's translation):

> Just barely a newborn, I soon knew where I'd come out from. Since then and until I grew up, in the same kind of hole I always like to be. In elementary school they called me "Mr. Hop." In junior high they called me "Punecinco" (invented word), because that's when I got into the habit of pleasing myself.

56. *"DJ Joe, Fatal Fantasy 2—Feat, Nejo, Speedy."* There are multiple segments in which women clad in bikini tops and thongs bend away from the camera—exposing their buttocks to the viewer—and simulate sexual intercourse. The music video includes a specific scene of a woman bending away from the camera wearing a thong while one of the male singers slaps her on the buttocks. The lyrics accompanying the segment translate as follows:

> I pushed her from the front. I took her and had her. I took her bra off. I lowered her panties like old times. I will give it to you through the ass. I will give it to you through the ass.[95]

57. *"Dangerous—Fatal Fantasy 2."* This promo for a DVD includes multiple scenes with scantily-clad women fondling themselves and each other in a sexual fashion. For example, there are scenes in which females caress their breasts, buttocks and/or genital area. The promo also includes several close-up camera shots of thong-clad buttocks, of scantily-clad breasts and crotches, and of a woman removing her top (with the shot changing just before her breasts are completely exposed). Some of these scenes also show a woman apply-

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Response at Exhibit 1-B.

[95] This translation is based upon our review of the material at issue. Aerco provides the following translation:

> I used to push her with my front part and with my chest far away. I used to take her and screw her. The brassieres I used to take off, the panties I used to take down, like in the old days, I'm giving it to you, I'm giving it to you.

Response at Exhibit 3-B.

ing baby oil to another woman's buttocks and women caressing each other's breasts and buttocks.

58. *"Operation Sandunga."* This material contains scenes with scantily-clad women depicting lap dances and a scene simulating oral sex. In one scene, the male singer is seated on a sofa with his legs spread apart. In between his legs kneeling on the floor is a female with her back to the camera whose head bobs up and down over the male's genital area, simulating oral sex. In other scenes, the woman is also variously shown kneeling and gyrating between his legs or straddling one leg and gyrating with her chest in his face. According to Aerco, the lyrics for the scene in which oral sex is simulated translate to: "You have to lick, lick, lick, lick, lick . . . You have to lick, mami, really 'be' . . . 'tra', [sic] to feel my thing and lick, mami, really 'be' . . . 'tra', [sic] to feel my thing."[98]

59. ***Indecency Analysis.*** For the reasons discussed below, we find that each of the complained-of videos and promo is apparently indecent.

60. *"DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan."* The material dwells on the singer's near-constant state of arousal, depicts a male child simulating masturbation, and the accompanying lyrics also refer to masturbation. We find, therefore, that the material meets the first prong of our indecency analysis.

61. Turning to the three principal factors that comprise our contextual analysis, as mentioned above, we also find that the material, in the context presented, is patently offensive under contemporary community standards for the broadcast medium. With respect to the

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[98] *Id.* at Exhibit 6-B (punctuation included in the original).

first factor, the material explicitly depicts a male child simulating masturbation, and includes lyrics also graphically and explicitly describing masturbation, including characterization of the child as a "masturbator," and a description of "rubbing himself" incessantly. We find, with respect to the second factor, that the material repeatedly discusses the singer's sexual arousal. We also find that the simulated masturbation and lyrics that refer to masturbation by a male child are not only pandering and titillating, they are shocking.

62. *"DJ Joe, Fatal Fantasy 2—Feat, Nejo, Speedy."* We find that this material depicts simulated sexual activity between a woman in a thong and a male singer. The lyrics accompanying this depiction refer to sexual activity, including "I took her and had her," "I lowered her panties like old times," and "I will give it to you through the ass." This material also depicts and describes the buttocks, which are sexual and excretory organs.[97]

63. We also find that the material, in the context presented, is patently offensive under contemporary community standards for the broadcast medium. The segment depicts simulated sexual intercourse and contains lyrics that graphically and explicitly describe sexual activities ("I will give it to you through the ass"). In

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[97] *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (Supreme Court did not disturb a city's indecency ordinance prohibiting public nudity, which listed the buttocks as among the body parts subject to the ordinance's ban on nudity); *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256, 269 (2d. Cir. 1999) (upholding state district court's determination that Time Warner's decision to not transmit certain cable programming that it reasonably believed indecent (some of which included "close-up shots of unclothed breasts and buttocks") did not run afoul of the Constitution).

this segment, women's buttocks are also clearly visible on screen. The segment dwells on and repeats the sexual material, the second factor in our analysis. We have repeatedly held that repetition and persistent focus on sexual material is a relevant factor in evaluating the potential offensiveness of broadcasts.[98] The camera angles throughout repeatedly dwell on shots that provide views of the female dancers' buttocks. The segment is focused entirely on the repetition of simulated sexual activity with accompanying lyrics that describe such activity. With respect to the third factor, we find that the simulated sexual activity, accompanied by explicit lyrics that reference sexual activity ("I will give it to you through the ass"), and the persistent visual focus on the female dancer's buttocks are presented in a manner that is obviously pandering and titillating.

64. *"Dangerous—Fatal Fantasy 2."* We find that this material meets the first prong of the Commission's indecency test. The material includes close-up shots of thong-clad buttocks, breasts and crotches, as well as females fondling their breasts, buttocks and genital areas while they dance, gyrate, and fondle one another in a sexually suggestive manner. These scenes clearly depict sexual organs and activities.

65. We also find that this material, in the context presented, is patently offensive under contemporary community standards for the broadcast medium. The material contains close-up shots of thong-clad buttocks, a female fondling her genital area, and women caressing their own breasts and buttocks as well as those of oth-

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[98] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); *see also Married By America NAL*, 19 FCC Rcd at 20196 ¶ 11; *Entercom Seattle Order on Review*, 19 FCC Rcd at 9073-74 ¶ 13.

ers. Thus, we conclude that the material is graphic and explicit. Second, while not dispositive, it is relevant that these types of images appear numerous times throughout the promo and, therefore, that sexual images are sustained and repetitious. Finally, the close-up shots of thong-clad buttocks and women fondling their own breasts, buttocks and genital areas as well as the breasts and buttocks of other women in a sexually suggestive manner are presented in a pandering and titillating manner. Indeed, this material appears to have little other purpose. Therefore, because the complained-of material is explicit and graphic, repeated, and is pandering and titillating, we conclude that the promo is patently offensive and thus indecent.

66. *"Operation Sandunga."* This material meets the first prong of the indecency test. As noted above, this material includes a scene and lyrics describing and depicting oral sex, a sexual activity. Accordingly, we find that the material describes and depicts a sexual activity. We also find that the material, in the context presented here, is patently offensive under contemporary community standards for the broadcast medium. With respect to the first principal factor that informs our contextual analysis, the scene and lyrics depict and describe a female performing oral sex in a manner that is graphic and explicit. With respect to the second factor, while not dispositive, it is relevant that sexual references are sustained and repeated. The scene depicting oral sex is coupled with numerous other scenes depicting the same woman gyrating suggestively as she kneels between the male singer's legs or straddles one of his legs with her chest thrust in his face, apparently simulating a "lap dance." Finally, the graphic depictions of oral sex, joined with the repeated and explicit lyrics in

which men direct women to lick their genitals, panders to and titillates the audience. Therefore, because the complained-of material is explicit and graphic, repeated, and shocks, panders, and titillates, we conclude that the video is patently offensive and thus indecent.

67. Aerco states that the music videos and other broadcast material at issue here may be suggestive, but are not indecent or obscene under prevailing standards.[99] Aerco cites the *Indecency Policy Statement* to support its assertion.[100] We disagree with Aerco's analysis. These broadcasts combine sexually explicit language and innuendo with visual depictions that graphically depict the meaning of the lyrics.[101] We also do not agree with Aerco's argument that the lyrics are barely intelligible.

68. According to the Complaints and videotapes, Aerco broadcast each of the music videos and the promo on multiple occasions. Aerco, in its *Response*, states that it is unable to determine whether it broadcast "DJ

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[99] *See* Response at 10.

[100] *Id.*

[101] To the extent that the music videos' and the promo's use of visual images in conjunction with lyrics to describe and depict sexual activity could be described as innuendo rather than direct references, they are nonetheless sufficiently graphic and explicit to render the material actionably indecent because the sexual import of those images in conjunction with those lyrics was "unmistakable." *See Married By America NAL*, 19 FCC Rcd at 20194 ¶ 10 (proposing forfeiture for airing nudity, finding that despite electronic blurring ("pixilation") "even a child would have known the strippers were topless and that sexual activity was being shown"). *See also Indecency Policy Statement*, 16 FCC Rcd at 8003-04 ¶ 12; *Telemundo of Puerto Rico License Corp. (WKAQ-TV)*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 7157, 7159, ¶ 8 (Enf. Bur. 2001) (forfeiture paid) ("*Telemundo NAL*").

Joe, Fatal Fantasy 2—Feat, Trebol, Clan" or "DJ Joe—Fatal Fantasy 2—Feat, Nejo, Speedy" because its program logs list three music videos with similar titles.[102] Aerco confirms that the promo for the DVD titled "Dangerous—Fatal Fantasy 2" aired on the four dates alleged in the complaints, but states that it is unable to determine the broadcast times.[103] Aerco also asserts that it is unable to determine whether "Operation Sandunga" was aired on the date alleged in the complaint because it has no records of this music video.[104] Aerco states that it broadcast programs produced by independent producers after 10:00 p.m. and that it "could" have aired the independently produced "Operation Sandunga" music video during this time period.[105]

69. Based on the complaints and the accompanying videotapes, and in the absence of any evidence to the contrary,[106] we find that Aerco broadcast each of the music videos and the promo in question multiple times—a total of at least 14 broadcasts—between the hours of 6 a.m. and 10 p.m., the time frame relevant to an indecency determination.[107] Because there is a reasonable

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[102] *See* Response at 2-3.

[103] *Id.* at 4.

[104] *Id.* at 4.

[105] *Id.* at 4-5.

[106] *See Entercom Sacramento License, LLC*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20129 ¶ 5 (2004) (proposing a forfeiture in a case where the licensee could not deny the broadcast occurred).

[107] *See* 47 C.F.R. § 73.3999. Based on the videotape and data provided by the Complainants, we conclude that the station aired "DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan" between the hours of 6:00 a.m. and 10:00 p.m. on February 2 (12:00-12:43 p.m.), 22 (5:00-6:30 p.m.), 26 (3:00-3:30 p.m.) and 28, 2002 (2:05-2:50 p.m.); "DJ Joe, Fatal Fantasy

risk that children may have been in the audience when the material in each was broadcast, the material broadcast is legally actionable. By broadcasting this material during these times over Station WSJU-TV, Aerco apparently violated the prohibitions in the Act and the Commission's rules against broadcast indecency.

70. ***Forfeiture Calculation.*** Aerco consciously and deliberately broadcast the videos and the DVD promo. Accordingly, we find that the broadcasts in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 were willful within the meaning of section 503(b)(1) of the Act. Additionally, Aerco aired this material a total of 14 times. Accordingly, we find that Aerco's apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was also repeated.

71. We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case. Based on consideration of the statutory factors, we find it is appropriate to use the statutory maximum amount of $27,500[108] to calculate the proposed forfeiture in this case. The gravity of the apparent violations is heightened in this case because, as discussed

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2—Feat, Nejo, Speedy" on February 22 (5:30-6:30 p.m.), 26 (6:00-6:30 p.m.), March 6 (10:00-10:52 a.m.), and 27 (5:45-5:48 p.m.). We also find that the station aired "Dangerous—Fatal Fantasy 2" on February 28 (2:05-2:50 p.m.), March 1 (1:13-1:53 p.m.), 4 (6:50 p.m.), 5 (9:40-10:17 a.m.) and 8, 2002 (11:51 a.m.-12:55 p.m.). We also find that the station aired "Operation Sandunga" on March 6, 2002, between 10:00 and 10:52 a.m.

[108] The subject broadcasts occurred prior to the September 7, 2004, effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $27,500. *See supra* ¶ 21.

above, the music videos and the DVD promo at issue are extremely graphic and explicit, including close-up scenes of sexual fondling and simulated oral sex, which are repeated throughout the material. One broadcast segment explicitly depicts a child masturbating, and another repeatedly displays women's buttocks in a pandering and titillating manner. All of the material depict and describe sexual organs or activities in a highly shocking, vulgar, and gratuitous manner. In addition, this material could have been reviewed by Aerco prior to broadcast. Multiplying the statutory maximum amount of $27,500 by the 14 broadcasts at issue here results in a total forfeiture amount of $385,000. Under the specific circumstances of this case, however, we believe that such a forfeiture would be excessive to achieve the appropriate level of punishment and deterrence and that $220,000 is a more appropriate amount. We base this conclusion on several factors, including the fact that Aerco is the licensee of only San Juan, Puerto Rico, Stations WSJU-TV and WQBS(AM) and that it has no prior indecency violations. Therefore, for the reasons stated above, we propose a forfeiture of $220,000 against Aerco Broadcasting Corp. for its willful and repeated violations of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

5. "The Blues: Godfathers and Sons" (March 11, 2004)[109]

72. *The Programming.* The Commission received a complaint alleging that San Mateo County Community College District ("San Mateo"), licensee of noncommercial educational Station KCSM-TV, San Mateo, California, aired indecent material over the station during its

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[109] FCC File No. EB-04-IH-0260.

broadcast of the program "The Blues: Godfathers and Sons" on March 11, 2004 between the hours of 8:42 and 9:32 p.m. Pacific Standard Time.[110] The complaint alleged that the broadcast, an episode of a prerecorded documentary series provided by the Public Broadcasting Service ("PBS"), contains numerous "obscenities," including the "F-Word," the "S-Word" and various derivatives of those words, in violation of the Commission's rules restricting the broadcast of indecent material.[111] The complainant therefore asked that the Commission investigate and take appropriate enforcement action.

73. Thereafter, the Bureau sent a letter of inquiry to San Mateo, attaching a copy of the Complaint.[112] In its response, San Mateo acknowledges that it aired "The Blues: Godfathers and Sons," a documentary containing interviews of blues performers and a record producer,

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[110] *See* Letter from complainant to the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission March 18, 2004) ("Complaint").

[111] According to the Complaint, the program includes the following objectionable utterances broadcast between 8:42 and 9:32 p.m.:

8:42 p.m..: "See those, motherfucker? Gotta pay those motherfucking notes."
8:51 p.m.: "What's my job? You stupid motherfucker, your job is to follow me."
9:00 p.m.: "Shit it's good to be next to you."
9:04 p.m.: "there's no white bullshit with [Paul] Butterfield."
9:13 p.m.: "I'll buy some shit."
9:14 p.m.: "This is the kind of shit I buy."
9:23 p.m.: "Cocksucker Blues" (used as an on-screen Chyron to identify a song title).
9:32 p.m.: "This poor fucker."

[112] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to San Mateo (August 4, 2004) ("LOI").

over Station KCSM-TV as alleged, between 8 and 10 p.m. on March 11, 2004, but not on any other dates between 6:00 a.m. and 10:00 p.m.[113] With its response, San Mateo provided a DVD and a written transcript of the program.[114] San Mateo does not dispute that it aired the material described in the complaint. It states, "[t]he intent of the program is to provide a window into [the world of the individuals being interviewed] with their own words, all of which becomes an educational experience for the viewer." Thus, San Mateo maintains that the language contained in the program was not "used in a prurient way, but rather as an infrequent conversational expression of the artist [being interviewed], and was not edited to remove their dialogue, which accurately reflected their viewpoints."[115] San Mateo represents that, subsequent to its station's airing of the program, PBS alerted its member stations that this and similar PBS-supplied programs contained material that might be deemed indecent in light of then-recent Commission rulings, and advised licensees that PBS had changed its procedures involving the editing of potentially indecent or offensive language in programming that it provides them and will now alert licensees to potential problems.[116]

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[113] *See* Letter from Marilyn R. Lawrence, General Manager, KCSM-TV/(FM), to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (August 27, 2004) ("Response") at 1.

[114] *Id.*

[115] *Id.*

[116] *Id.* San Mateo appears to refer to the *Golden Globe Awards Order*.

74. ***Indecency Analysis.*** The Commission determined in its *Golden Globe Awards Order* that the "F-Word" meets the first prong of the indecency test. We stated, "given the core meaning of the "F-Word," any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[117] Similarly, we now find that the "S-Word," at issue here, has an inherently excretory connotation. In light of the core meanings of the "F-Word" and "S-Word," any use of those terms inherently has sexual or excretory connotations and falls within the first prong of our indecency definition.[118]

75. We also find that the broadcast material is, in context, patently offensive as measured by contemporary community standards for the broadcast medium. First, as we stated in *Golden Globe Awards Order*, the "F-Word" is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image."[119] Similarly, we find the "S-Word" to be one of the most vulgar, graphic and explicit words relating to excretory activity in the English language. Use of the "S-Word" invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast by San Mateo of a program containing numerous uses of the "F-Word" and the "S-Word," under the circumstances presented here, is vulgar, graphic, and explicit.

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[117] *Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8.

[118] *See Pacifica Foundation*, 56 FCC 2d at 99.

[119] *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

76. Second, the program repeats this language numerous times during the broadcast. We note that, while prior FCC staff actions had indicated as of the date this program aired that isolated broadcasts of certain expletives were not indecent or would not be acted upon, the program at issue here contains numerous repeated utterances of the "F-Word" and "S-Word," and their variants. Our precedent is clear that broadcasts containing numerous expletives may be actionably indecent.[120]

77. Third, the gratuitous and repeated use of this language in a program that San Mateo aired at a time when children were expected to be in the audience is shocking. While San Mateo contends that the expletives in question were not removed from the program so that the viewpoints of those being interviewed would be accurately reflected, as discussed below we disagree that the use of such language was necessary to express any particular viewpoint in this case.[121] We also note that many of the expletives in the broadcast are not used by blues performers. For example, based on our review of the DVD and transcript, Marshall Chess, a former label owner and record producer, states in discussing the relationship between Chess Records and its artists, "my dad had so many people at his funeral, my uncle said, 'You see all those motherfuckers? They're coming to make sure he's dead, so they don't have to pay back those motherfuckin' notes.'" In another scene, discussing his relationship with his father at Chess Records,

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[120] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 16 (*citing Back Bay NAL*, 14 FCC Rcd at 3998, which found the broadcast of repeated uncensored uses of the "F-Word," among other expletives, to be indecent).

[121] *See infra* ¶ 82.

Marshall Chess states, "[h]e said, 'What's your job? You stupid motherfucker! Your job is watching me!'" During a scene showing hip-hop artists Kyle Jason, Juice, and Chuck D. shopping in a record store with Chess, Kyle Jason states, "I'll buy some shit," and Juice states, "This looks crazy! See that? This is the kind of shit I buy! I mean, my man is wearing pink gear—that shit, that shit is crazy right there! I'm buyin' it!"

78. In sum, because the expletives in the program are vulgar, explicit, graphic, dwelled upon and shocking to the audience, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[122] Therefore, there is a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

79. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." We indicated in that decision that the Commission would analyze other potentially profane words on a case-by-case basis.

80. The "F-Word" is a vulgar sexual term so grossly offensive to members of the public that it amounts to a

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[122] *See* 47 C.F.R. § 73.3999.

nuisance and is presumptively profane. It is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home. Consistent with our decision in the *Golden Globe Awards Order*, we find here that the use of the "F-Word" in the program at issue violated 18 U.S.C. § 1464's prohibition of the broadcast of "profane" language.[123]

81. In addition, we find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

82. As noted previously, in rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[124] However, we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case the profane language may have had some communicative purpose, we do not believe that San Mateo has demonstrated that it was essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance, or that the substitution of other language would have materially altered the nature of the work. In this respect, this case is unlike *Saving Private Ryan*,

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[123] *Id.* at 4981 ¶¶ 13-14.

[124] 20 FCC Rcd at 4512-14 ¶¶ 13-18.

where we concluded that deleting offensive words "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."[125] While we recognize here that the documentary had an educational purpose, we believe that purpose could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives.

83. It is undisputed that the complained-of material, including the "F-Word" and the "S-Word," was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast on March 11, 2004, the material broadcast is legally actionable.[126]

84. ***Forfeiture Calculation***. San Mateo consciously and deliberately broadcast this episode. Accordingly, we find that the broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.[127] Taking into account the statutory factors and the circumstances of this case, we conclude that the appropriate proposed forfeiture in this case is $15,000.

85. The Commission's prohibition on the repeated use of expletives, including the "F-Word" and "S-Word,"

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[125] *Id.* at 4512-13 ¶¶ 13-14.

[126] *See ACT III*, 58 F.3d at 660-63.

[127] Because the broadcast in question was aired prior to the release of the *Golden Globe Awards Order*, our profanity finding will not factor in our determination of any sanction in this case.

was well settled prior to March 2004.[128] The complained-of material contains numerous unedited expletives. The program in question was supplied to the licensee by PBS replete with two words that are among the most vulgar, graphic, and explicit descriptions of sexual and excretory activity in the English language, but whose propriety San Mateo nevertheless failed to question. By broadcasting the program complete with these expletives, San Mateo effectively abdicated this aspect of its programming control to an outside entity, PBS.[129] On the other hand, however, we do recognize that the expletives here were contained in a documentary, and while we conclude that the arguments made by the licensee are mistaken, we do find that the licensee may have been under the good faith belief that the use of these expletives served a legitimate informational purpose. Additionally, we recognize the fact that the licensee runs a

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[128] *See, e.g., Pacifica*, 438 U.S. at 744 (upholding the Commission's finding that the broadcast of the comedy monologue "Filthy Words" featuring, among other things, repeated uses of the F-Word and the S-Word was patently offensive and violated the statutory prohibition on indecency).

[129] San Mateo states that its arrangement with PBS required that it defer for several months from broadcasting the program, which aired over most PBS stations in October and November 2003. San Mateo represents that, because its scheduling is done three months in advance of the actual airdate, "the decision to air this series was made in November since the first episode of the series was aired in February." *Response* at 1. To the extent that San Mateo cites this circumstance to suggest that it did not have adequate notice that the expletives contained in the program were prohibited from broadcast prior to the Commission's issuance of the *Golden Globe Awards Order* on March 18, 2004, we reject this contention. To the contrary, San Mateo had months after the national airing of the episode at issue to ascertain the questionable content of the program and to take steps to ensure that it did not broadcast the repeated uses of objectionable words at issue.

small, community station that airs college level educational courses for most of the day. Under these circumstances, we believe that a proposed forfeiture in the amount of $15,000 is warranted here.[130]

86. Although other stations may have also broadcast the subject episode of "The Blues: Godfathers and Sons," we propose a forfeiture only against San Mateo as the only licensee with a station whose broadcast of the material between 6 a.m. and 10 p.m. was the subject of a viewer complaint filed with the Commission.[131] We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.[132] We find, in this case, however, that, in the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that program. Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties.[133]

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[130] We exercise our prosecutorial discretion not to propose forfeitures based on the multiple utterances of expletives in this case because the use of individual expletives was not actionable under Commission precedent prior to the *Golden Globe Awards Order*. *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12. While repetition of expletives in certain scenes might have qualified as actionable before the *Golden Globe Awards Order*, we decline to establish a method of identifying multiple utterances that applies only to pre-*Golden Globe Awards Order* programs.

[131] The fact that San Mateo may not have originated the programming in question is irrelevant to whether there is an indecency violation. *See supra* note 47.

[132] *See supra* note 48.

[133] *See supra* ¶ 11 and note 11.

Accordingly, we propose a forfeiture of $15,000 against San Mateo.

6. "The Pursuit of D.B. Cooper" (March 15, 2003)[134]

87. ***The Programming.*** A viewer filed a complaint with the Bureau alleging that Station KTVI(TV), St. Louis, Missouri, licensed to KTVI License, Inc ("KTVI"), repeatedly aired the "S-Word" on the afternoon of Saturday, March 15, 2003, during the broadcast of a movie featuring a fictional account of the fate of D.B. Cooper, the alias used by a person who disappeared after skyjacking an airplane and extorting money from an airline in 1971. The movie contains numerous scenes in which the "S-Word" is used: a scene in which D.B. Cooper refers to an aborted disguise ("shit"); a flashback scene between Cooper and his then-commanding officer ("horseshit"); a scene between the insurance investigator pursuing Cooper and the investigator's boss ("shit"); a café scene ("bullshit"); a scene between Cooper's father and ex-wife in which she describes Cooper as having a "shit-eating grin;" a scene after a fire ("bullshit" used twice); a scene during which Cooper escapes from his pursuers by boarding a river raft ("oh, shit!"); and a scene in which a former crony of Cooper buys a used car ("bullshit"). In a subsequent scene involving repairs to a car, an auto mechanic claims he will have the car running "slicker'n owl shit" and "smoother'n owl shit." When the car breaks down, Cooper refers back to the mechanic's words ("smoother'n owl shit" twice). At the end of the movie, in scenes in which Cooper is pursued by his former crony and the investigator, the "S-Word" is reiterated on several occasions: in a scene fea-

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[134] FCC File No. EB-03-IH-0136.

turing the two pursuers ("shit"); a scene featuring a telephone call between the investigator and his boss ("shit"); a scene taking place aboard an airplane ("shit" and "oh, shit!"); a scene in which Cooper uses the airplane to chase a car driven by his former crony ("holy shit" and "shit"); and a scene after the airplane crashes ("bullshit").

88. The Bureau sent the licensee a letter of inquiry and attached the complaint.[135] KTVI contends that the aired material is not actionably indecent. The licensee argues that the material at issue is not graphic or explicit, that it is not dwelled upon and that it is not titillating or presented for shock value.[136] KTVI does not claim to have provided any parental warnings prior to or during its broadcast of the film, which occurred from 2:00 to 4:00 p.m.[137]

89. ***Indecency Analysis***. KTVI acknowledges - and our review confirms - that the aired movie, "The Pursuit of D.B. Cooper," includes repeated uses of the words "shit," "bullshit," and "owl shit."[138] Each of those terms, of course, has a clear excretory connotation and describes an excretory activity. Thus, the complained-of

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[135] *See* Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to KTVI License, Inc. (December 30, 2004).

[136] *See* Letter from John C. Quale, Counsel to KTVI License, Inc., to the Investigations and Hearings Division, Enforcement Bureau (January 31, 2005), and accompanying "Response of KTVI(TV), St. Louis, Missouri to FCC Letter of Inquiry" at 2.

[137] *Id.* at 1.

[138] These terms will be referred to collectively here in as the "S-Word."

material falls within the first prong of our indecency definition.

90. Turning to the second step of our indecency analysis - whether the broadcast material is patently offensive - we conclude, looking at the three principal factors in our contextual evaluation, that the complained-of material is patently offensive under contemporary community standards for the broadcast medium.

91. First, the material is quite graphic and explicit. The "S-Word" is a vulgar, graphic and explicit description of excrement. Its use invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast of a program containing numerous uses of the "S-Word" and its variations, under the circumstances presented here, is vulgar, graphic and explicit.

92. Second, the "S-Word," in various iterations, is used on a number of occasions. We note that, while prior Commission and staff actions had indicated as of the date this program aired that isolated broadcasts of certain expletives were not indecent or would not be acted upon,[139] the program at issue here contains repeated utterances of the "S-Word," and its variants. As noted above, the Commission has previously held that repeated use of expletives may be actionably indecent.[140]

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[139] We note that in the *Golden Globe Awards Order*, which was issued after the conduct at issue in this case took place, the Commission overruled prior staff decisions finding that broadcasts containing a single expletive were not indecent. 19 FCC Rcd at 4980 ¶ 12.

[140] *See Indecency Policy Statement*, 16 FCC Rcd 7999, 8008 ¶ 16 (2001) (citing *Back Bay NAL*, 14 FCC Rcd at 3998, which found the broadcast of repeated uncensored references to the "F-Word," among other expletives, to be indecent).

93. Third, and most important to our analysis, multiple gratuitous iterations of the "S-Word" broadcast on a weekend afternoon at a time when children are likely to be in the audience, shock, pander to, and titillate the audience.[141] By failing to edit the movie, the licensee needlessly offended unsuspecting viewers in their homes on a weekend afternoon.[142]

94. In sum, because the material is explicit and graphic, is dwelled upon, and shocks, panders, and titillates, we conclude that its broadcast here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m.

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[141] *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9. *See also Agape Broadcasting Foundation, Inc. (KNOM(FM))*, Notice of Apparent Liability for Forfeiture, 9 FCC Rcd 1679 (Mass Media Bur. 1999) (subsequent history omitted) (citing licensee's decision to run explicit material unedited, during a mid-afternoon broadcast when children were likely to be in the audience), *cited in Indecency Policy Statement*, 16 FCC Rcd at 8014, ¶ 21.

[142] In *Saving Private Ryan*, 20 FCC Rcd at 4513 ¶ 15, we found that that the network "did not intend the broadcast of a feature film as family entertainment, a fact clearly and explicitly stated in the introduction that precedes the film and is repeated in the aural and visual viewer advisory and voluntary parental code that follow each commercial break during the broadcast. Thus, parents had ample warning that this film contained material that might be unsuitable for children and could have exercised their own judgment about the suitability of the language for their children in the context of this film." Unlike *Saving Private Ryan*, we find that the vulgar material here could have been edited without materially altering the broadcast. Additionally, we disagree with the licensee's argument that all of the complained-of material was used as a means of expressing anger or frustration throughout the course of an intense car chase. As a factual matter, it is not correct that all of the material in question occurred during the scenes involving the car chase. Multiple iterations of the "S-Word" occurred in other scenes.

to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[143] Therefore, there is a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

95. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."

96. In this case, as in the related cases in this decision, we similarly find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. For the reasons stated above, use of the "S-Word" invariably invokes a coarse excretory image. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

97. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[144] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here. Although in this case, the profane language in this

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[143] *See* 47 C.F.R. § 73.3999.

[144] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

film may have had some communicative purpose, we do not believe that it was essential to the nature of an artistic or educational work or that editing the language would have materially altered the nature of the program. Based upon our review of the record in this case, we conclude that KTVI aired profane material between 6 a.m. and 10 p.m. in violation of 18 U.S.C. § 1464.

98. ***Forfeiture Calculation.*** KTVI consciously and deliberately broadcast this film. Accordingly, we find that the broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.[145] We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case.

99. We find that the statutory maximum of $27,500[146] is an appropriate proposed amount for the March 15, 2003 broadcast. The material was prerecorded, and KTVI could have edited the content prior to broadcast. In addition, as noted above, the gravity of the apparent violation is heightened here because of its shocking and gratuitous nature, involving as it does multiple gratuitous utterances of vulgar, graphic, and offensive expletives during a weekend afternoon broadcast. The Commission's prohibition of the broadcast of re-

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[145] Because the broadcast in question was aired prior to the release of the *Golden Globe Awards Order*, our profanity finding will not factor in our determination of any sanction in this case.

[146] The subject broadcasts occurred prior to the September 7, 2004, effective date of the most recent adjustment in the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $27,500. *See supra* ¶ 21.

peated uses of expletives such as the "S-Word" was well settled prior to its broadcast.[147] The program in question was replete with an expletive that is among the most vulgar, graphic, and explicit descriptions of excretory activity in the English language, but which KTVI nevertheless failed to edit out, suggesting indifference to our indecency regulations. Therefore, we find that KTVI License, Inc. is apparently liable for a proposed forfeiture of $27,500 for its March 15, 2003 broadcast of "The Pursuit of D.B. Cooper."[148]

B. Indecent And/Or Profane Broadcasts But No Forfeiture Proposed

100. In each of the following cases, we find that the broadcasts at issue are indecent and profane. Because of the specific circumstances associated with the broadcasts, however, we do not propose forfeitures. With one exception, these broadcasts preceded the Commission's decision in the *Golden Globe Awards* Order reversing

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[147] *See, e.g., Pacifica*, 438 U.S. at 744 (upholding the Commission's finding that the broadcast of the comedy monologue "Filthy Words" featuring, among other things, repeated uses of the S-Word was patently offensive and violated the statutory prohibition on indecency).

[148] We do not propose forfeitures based on each of the multiple utterances of expletives in this case because the broadcast took place before the Commission warned licensees that it might treat separate indecent utterances in the same program as separate violations. *See Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 6915, 6918-19, ¶ 12 (April 3, 2003) ("*WKRK NAL*"), *vacated in non-relevant part*, *Viacom, Inc.*, Order and Consent Decree, 19 FCC Rcd 23100, 23107, ¶ 10 (2004) (vacating all indecency forfeitures against licensee's parent company but preserving the warnings in the *WKRK NAL* that the Commission might propose forfeitures for discrete violations in a single broadcast and might propose to revoke broadcast licenses for egregious or repeat violations).

precedent that had suggested that the isolated use of an offensive word like the "F-Word" is not indecent. In light of our decision not to impose a forfeiture based upon the facts of each case, we will not require the licensee of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications and we will not consider the broadcast to impact adversely upon such licensees as part of the renewal process.

1. **"The 2002 Billboard Music Awards" (December 9, 2002)[149]**

101. ***The Programming.*** The Commission received a complaint concerning the December 9, 2002 broadcast of the "Billboard Music Awards" program over Fox Television Network ("Fox") stations, and specifically Station WTTG(TV), Washington, DC, between 8 and 10 p.m., Eastern Standard Time.[150] The complaint alleges that, during the broadcast, the performer Cher states, "People have been telling me I'm on the way out every year, right? So fuck 'em." The complaint alleges that the expletive was indecent and requests that the Commission levy sanctions against each station licensee that aired the material. The Enforcement Bureau obtained a videotape of the offending broadcast that confirms the complaint's allegation.

102. ***Indecency Analysis.*** We held in the *Golden Globe Awards Order* that, given the core meaning of the "F-Word," any use of that word inherently has a sexual

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[149] FCC File No. EB-03-IH-0460.

[150] *See* Letter from Lara Mahaney, Parents Television Council to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

connotation and falls within the first prong of our indecency definition.[151] Cher's retort to her critics used language that we have found inherently describes sexual activity. The material, therefore, warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary standards for the broadcast medium. We conclude, looking at the three principal factors in our contextual analysis, that the material is patently offensive.

103. First, the complained-of material is quite graphic and explicit. As we indicated in the *Golden Globe Awards Order*, the "F-Word" is one of the most vulgar, graphic, and explicit words relating to sexual activity in the English language. Its use invariably invokes a coarse sexual image."[152] We conclude that the broadcast of the "F-Word," under the circumstances presented here, is vulgar, graphic and explicit.

104. Second, the fact that the material is not repeated or not dwelled upon at length, while relevant, is not dispositive. As the Commission indicated in the *Golden Globe Awards Order*: "[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[153]

105. Third, and most important to our analysis in this specific context, Cher's use of the "F-Word" here, at a live broadcast of an awards ceremony when children were expected to be in the audience, was shocking and

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[151] 19 FCC Rcd at 4978 ¶ 8.

[152] *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

[153] *Id.*, 19 FCC Rcd at 4980 ¶ 12.

gratuitous.[154] Cher chose to express her displeasure with her critics in a highly vulgar and coarse manner, and in doing so, needlessly offended unsuspecting viewers in the peace and quiet of their homes.

106. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. Technological advances have made it possible to block the broadcast of offensive words without disproportionately disrupting a speaker's message.[155] Fox could have avoided the indecency violation here by delaying the broadcast for a period of time sufficient to ensure that all offending words were blocked.[156] It did not do so. As a result, the Fox affiliate WTTG(TV) broadcast highly offensive material within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules. By broadcasting this material, the station apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency.

107. ***Profanity Analysis.*** The "F-Word" is a vulgar sexual term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. The "F-Word" is one of the most offensive

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[154] *Id.*, 19 FCC Rcd at 4979 ¶ 9.

[155] *See id.*, 19 FCC Rcd at 4980 ¶ 11.

[156] *See id.*, 19 FCC Rcd at 4980 ¶ 11. We note that Fox has pledged, whenever possible, to air future live entertainment programming with a five-minute delay. *See* Response at 9. While we applaud that change in Fox's practices, it does not excuse the apparent indecency violation in this case.

words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home. Consistent with our decision in the *Golden Globe Awards Order*, we find here that the use of the "F-Word" in the program at issue here apparently violated 18 U.S.C. § 1464's prohibition of the broadcast of "profane" language.[157]

108. In rare contexts, language that is presumptively profane will not be found to be profane where its use is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[158] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case, the profane language used by Cher may have had some communicative purpose, we do not believe that Fox has demonstrated that the use of such language was essential to informing viewers on a matter of public importance or that editing the language in question would have had a material impact on the network's function as a source of news and information. We note again that Fox or Station WTTG(TV) could have used a delaying technique to avoid the offending broadcast.

109. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audi-

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[157] *Id.*, 19 FCC Rcd at 4981 ¶¶ 13-14.

[158] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

ence at the time the material at issue was broadcast, the material broadcast is legally actionable.[159]

110. ***No Sanction Proposed.*** In the instant case, we find that the Fox Network affiliate Station WTTG(TV) consciously and deliberately broadcast the program in question. Accordingly, we find that the station's apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. Thus, we conclude that the Fox affiliate Station WTTG(TV) aired indecent and profane material between 6 a.m. and 10 p.m. in apparent violation of 18 U.S.C. § 1464 and our rules.

111. The gratuitous use of indecent and profane language on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the *Golden Globe Awards Order*. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take enforcement action against isolated use of expletives.[160] "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [Fox] and other licensees that broadcast the program prior to 10 p.m."[161] Accordingly, we find that no forfeiture is warranted in this case.

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[159] *See ACT III*, 58 F.3d at 660-63[.]

[160] *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation*, 2 FCC Rcd at 2699).

[161] *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

2. "The 2003 Billboard Music Awards" (December 10, 2003)[162]

112. ***The Programming.*** The Commission received a number of complaints alleging that the Fox Television Network ("Fox" or "Fox Network") aired indecent material during the "Billboard Music Awards" program on December 10, 2003 between 8 and 10 p.m., Eastern Standard Time.[163] The complainants allege that, during the broadcast, Nicole Richie, an award presenter, uttered vulgar expletives in violation of the Commission's rules restricting the broadcast of indecent material.[164]

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[162] FCC File Nos. EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091.

[163] *See* Letter from Lara Mahaney, Parents Television Council to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (December 11, 2003). We also deny an additional complaint from PTC regarding another segment of that same broadcast. *See* Letter from Lara Mahaney, Parents Television Council, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (January 22, 2004) (*"Second PTC Complaint"*). *See* note 195 *infra*.

[164] According to Fox, the Fox affiliate stations located within the Eastern and Central Time Zones broadcast the following exchange between Paris Hilton and Nicole Richie after they walked onstage to present an award:

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
> Nicole Richie: Okay, God.
> Paris Hilton: It feels so good to be standing here tonight.
> Nicole Richie: Yeah, instead of standing in mud and cow[blocked].
>
> Why do they even call it "The Simple Life"? Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

Fox advises that it edited the tape to remove the expletives before the program aired on tape delay over Fox Stations in the Mountain and Pacific time zones. *See* Letter from John C. Quale, Counsel to Fox Tel-

The complainants request that the Commission levy sanctions against each station licensee that aired the remarks.

113. The Bureau sent Fox a letter of inquiry and attached a transcript of the material in question.[165] Fox responded on January 30, 2004.[166] Fox contends that the aired material is not actionably indecent and does not contain any description or depiction of sexual or excretory organs or activities in a patently offensive manner.[167]

114. ***Indecency Analysis.*** During her appearance on the "Billboard Music Awards," Ms. Richie uttered the "F-Word" and the "S-Word." Fox does not dispute that the "S-Word" refers to excrement.[168] Fox contends, however, that Ms. Richie used the "F-Word" as a mere vulgar expletive to express emphasis, not to depict or describe sexual activities.[169] We disagree. Given the core meaning of the "F-Word," any use of that word inherently has a sexual connotation and falls within the

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evision Stations, Inc., to Investigations and Hearings Division, Enforcement Bureau (Jan. 30, 2004) ("Response") at 3-4, 8.

[165] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc. (January 7, 2004).

[166] *See supra* note 179.

[167] *See* Response at 12-13.

[168] *Id.* at 13. We note, however, that even if Ms. Richie was not literally referring to cow excrement, her use of the "S-Word" would still fall within the subject matter prong of our indecency definition. The "S-Word" has an excretory connotation, however it may be used. Its use invariably invokes a course excretory image in any context.

[169] Response at 13.

first prong of our indecency definition.[170] We conclude that the material at issue clearly describes sexual and excretory activity. The material, therefore, warrants further scrutiny to determine whether or not it is patently offensive as measured by contemporary community standards for the broadcast medium. We conclude, looking at the three principal factors in our contextual analysis, that it is.

115. First, the complained-of material is quite graphic and explicit. The "F-Word" is one of the most vulgar, graphic, and explicit depictions of sexual activity in the English language. Its use invariably invokes a coarse sexual image.[171] Similarly, the "S-Word" is a vulgar, graphic, and explicit depiction of excretory activity. Its use invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast of the "F-Word" and the "S-Word," under the circumstances presented here, is vulgar, graphic and explicit.

116. Second, the fact that use of the words was not sustained or repeated, while relevant, is not dispositive. As the Commission indicated in the *Golden Globe Awards Order*: "[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[172]

117. Third, and most important to our analysis in this context, Ms. Richie's use of the "F-Word" and the "S-Word" here, during a live broadcast of a music

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[170] *See Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8; *see also Pacifica Foundation*, 56 FCC 2d at 99.

[171] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

[172] *Id.*, 19 FCC Rcd 4980 ¶ 12.

awards ceremony when children were expected to be in the audience, was shocking and gratuitous.[173] Indeed, Fox admits that the tone of the material was vulgar.[174]

118. Like the broadcaster discussed the *Golden Globe Awards Order*, Fox was "on notice that an award presenter or recipient might use offensive language during the live broadcast, and it could have taken appropriate steps to ensure that it did not broadcast such language."[175] As the previous case involving Cher demonstrates, Fox had clear notice that celebrities at this program might utter offensive expletives, including the "F-Word" during the broadcast. Moreover, the record of this broadcast shows that Fox, as the producer of the program and the network that carried it to affiliates throughout the country, deliberately sought to push the limits of decency. According to Fox, the original script called for Ms. Richie to make excretory references to "pig crap" and "cow manure," and to substitute the euphemism "freaking" for the "F-Word."[176] Under the circumstances, there was a palpable risk that Ms. Richie would use the "F-Word" and the "S-Word" instead of the euphemisms in the script.

119. Technological advances have made it possible to block the broadcast of offensive words without disproportionately disrupting a speaker's message.[177] Indeed, Fox utilized a five-second delay during the broadcast in question and successfully blocked Ms. Richie's first use

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[173] *Id.* at 4979 ¶ 9.

[174] *See* Response at 13.

[175] 19 FCC Rcd at 4979 ¶ 10.

[176] Response at 6.

[177] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 11.

of the "S-Word."[178] Fox could have avoided the indecency violation here by delaying the broadcast for a period of time sufficient to ensure that all offending words were blocked.[179] It did not do so. As a result, it broadcast highly offensive material within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.

120. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. By broadcasting this material, the Fox affiliated stations whose broadcasts were the subject of viewer complaints to the Commission apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency.[180]

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[178] *See* Response at 8.

[179] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 11. We note that Fox has pledged, whenever possible, to air future live entertainment programming with a five-minute delay. *See* Response at 9. While we applaud that change in Fox's practices, it does not excuse the indecency violation in this case.

[180] PTC also filed a complaint concerning an exchange between musician David Grohl and "Triumph the Insult Comic Dog," a hand puppet, during the same program. *See Second PTC Complaint*. According to a partial transcript attached to the complaint, the exchange focused on whether the puppet would "poop" on various celebrities. The exchange also included the phrases "kick-ass lip-singer," "sex with a dog," "singers that suck," "a lot of crap," "my ass," and "you suck." The transcript supplied by PTC stated that the references to pooping on someone were "slang for insults." *Id*. Moreover, the word "poop" is more puerile than offensive. The other words and phrases in question are not generally considered to be as graphic, vulgar, and offensive as the "S-Word" or the "F-Word," and most are fairly commonly used in a non-

121. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." In this case, we similarly find that the "F-Word" is a vulgar sexual term and the "S-Word" is a vulgar excretory term, each of which is so grossly offensive to members of the public as to amount to a nuisance and that each word accordingly is presumptively profane. For the reasons stated above, use of the "F-Word" invariably invokes a coarse sexual image and use of the "S-Word" invariably invokes a coarse excretory image. Each of these words is among the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

122. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a mat-

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sexual, non-excretory manner. Accordingly, although they may offend some people, we find that, viewed in the context in which they were used, "poop" and the other words and phrases in question were not patently offensive for the broadcast medium. *See, e.g., Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1931, 1938, ¶ 8 (2005) (*"PTC 2"*) (in context, fleeting uses of words such as "penis," "dick," "testicle," "vaginal," "ass," "bastard," and "bitch" not indecent). We note, however, that in another context, such as a more graphic and explicit description of sexual or excretory organs or activities, the use of these words might contribute to a finding of indecency. We also conclude that these words were not profane in this context.

ter of public importance.[181] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case, profane language may have had some communicative purpose, we do not believe that Fox has demonstrated that it was essential to informing viewers on a matter of public importance or that editing the language in question would have had a material impact on the network's function as a source of news and information.

123. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast, the material broadcast is legally actionable.[182]

124. ***No Sanction Proposed***. Based upon our review of the record in this case, we conclude that the Fox Network affiliated stations in the Eastern and Central Time Zones whose broadcasts were the subject of viewer complaints to the Commission aired material in violation of 18 U.S.C. § 1464 and our rules. They each broadcast indecent and profane words in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. The licensees of these stations each consciously and deliberately broadcast the program in question. Accordingly, the apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. The willful broadcast of indecent and profane material on a

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[181] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

[182] *See ACT III*, 58 F.3d at 660-63

national network broadcast ordinarily would warrant a forfeiture under the standards announced in the *Golden Globe Awards Order*. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take indecency enforcement action against isolated use of expletives.[183] "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [Fox] and other licensees that broadcast the program prior to 10 p.m."[184] Accordingly, we find that no forfeiture is warranted in this case.

3. "NYPD Blue" (various dates between January 14 and May 6, 2003)[185]

125. The Commission has received complaints alleging that KMBC Hearst-Argyle Television, Inc., licensee of Station KMBC-TV, Kansas City, Missouri, and other network stations affiliated with The ABC Television Network ("ABC") aired indecent material during several episodes of "NYPD Blue" broadcast between 9:00 and 10:00 p.m. Central Standard Time on various dates

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[183] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 (1987)). The fact that the statement in question included two expletives is unlikely to have removed it from the former isolated use exception under Commission precedent. The only pre-*Golden Globe Awards Order* decision of which we are aware in which a forfeiture was proposed for a single phrase or statement involved the use of multiple expletives combined with a description of sexual activity. *See LBJS Broadcasting Company*, Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 20956 (1998) (forfeiture paid) (finding broadcast apparently indecent for use of phrase "suck my dick you fucking cunt").

[184] *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[185] FCC File No. EB-03-IH-0355.

between January and May 2003.[186] The complaints allege that, in each of the identified episodes, one or more characters utter expletives in violation of the Commission's rules restricting the broadcast of indecent material. The complaints identify several expletives from the episodes at issue, specifically "dick," "dickhead" and "bullshit."[187]

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[186] Collectively referred to as the "NYPD Blue Expletive Complaints."

[187] The following examples illustrate the typical use of these expletives in the episodes at issue:

1/14/03 episode (Det. Sipowitz in response to his partner's arrest by Internal Affairs): "Alright, this is Bullshit!"

2/4/03 episode (Det. Sipowitz to street officer regarding that officer's partner framing Sipowitz's partner): "Over time - over what - bullshit, a beef!"

2/11/03 episode (Sipowitz speaking to a prisoner who had tried to trick Sipowitz into believing the prisoner was getting transferred to a different prison): "Game's been run dickhead. You ship out tomorrow. Wrong cop."

2/18/03 episode (stated by a suspect who bragged about, but now denies, killing his daughter): "I told people I killed Samia to try and get respect back. She had ashamed me and my community look at me as a fool."
Det. 1: "You took credit for killing your daughter?! Bullshit!"

4/15/03 episode (Det. harassing suspect who had harassed prosecutor): "I'm hoping this bullshit about you trying to get under ADA Haywood's skin is a misunderstanding."

4/8/03 episode (Sipowitz, referring to a wheel-chair bound, uncooperative witness to a murder): "and that dickhead in the wheel chair . . . threaten him with perjury and he'll fold."

4/29/03 episode (Det. questioning witness/suspect): "Maybe we should clarify Daly. We drop jail time for good information—not bullshit that wastes our time."

4/29/03 episode (Sipowitz, talking to a suspect who had recruited a youth (who the suspect thought was a minor) to commit a crime): "He's

126. The terms "dick" and "dickhead" are references to a sexual organ and therefore fall within the first prong of our indecency definition. Similarly, "bullshit," whether used literally or metaphorically, is a vulgar reference to the product of excretory activity and therefore falls within the first prong of our indecency definition. Accordingly, we must proceed to the three-part contextual analysis in our second prong to determine whether the material is patently offensive as measured by contemporary community standards for the broadcast medium. For the reasons stated below, we find "dick" and its derivative, "dickhead," not to be patently offensive in this context, whereas we find "bullshit" to be patently offensive in this context. Regarding the former term, we note that last year we found the same word and its variations not to be indecent in the context presented.[188]

127. First, we find that the terms "dick" and "dickhead," in this context, while understandably offensive to some viewers, are not sufficiently vulgar, explicit, or graphic descriptions of sexual organs or activities to support a finding of patent offensiveness. Second, while not dispositive, it is relevant that none of the programs dwell on these terms. Third, we find that those words, in context, are not sufficiently shocking to support a finding that they are patently offensive. Although the words are undeniably coarse and vulgar, they do not have the same level of offensiveness as the "F-Word" or

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16 Dickhead! An adult! . . . "

5/6/03 episode (Captain to Det. who harassed suspect in 4/15 episode): "He said you nearly assaulted his client last night."
Det: "Well, that's a bunch of bullshit."

[188] *See PTC 2*, 20 FCC Rcd at 1938, ¶ 8 (finding fleeting use of "dick" and its variations not indecent in context presented).

"S-Word." As we recently stated, "[a]lthough use of such words may, depending on the nature of the broadcast at issue, contribute to a finding of indecency, their use here was not patently offensive."[189] The broadcasts at issue here used these terms in a similar manner.[190] Therefore, under our three-part analysis and based on our precedent, we find the broadcasts of the terms "dick" and its derivative, "dickhead," as used in the "NYPD Blue" episodes at issue, are not patently offensive.

128. However, we do conclude that the broadcasts of a derivative of the "S-Word" at issue here are patently offensive. First, consistent with our analysis of the "F-Word" in the *Golden Globe Awards Order*, we find the "S-Word" to be one of the most vulgar, graphic and explicit descriptions of excretory activity in the English language. Its use invariably invokes a coarse excretory image. We conclude that the broadcast of the "S-Word," under the circumstances presented here, is vulgar, graphic and explicit.

129. Second, while the word is not dwelled upon, in the *Golden Globe Awards Order*, the Commission reversed precedent that had suggested that the isolated use of an offensive word like the "F-Word" is not inde-

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[189] *See Complaints Filed By Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920, 1926 ¶ 8 (2005) ("*PTC 1*"); *PTC 2*, 20 FCC Rcd at 1938 ¶ 8.

[190] *See PTC 1*, 20 FCC Rcd at 1926, ¶ 8 ("A number of complaints cite isolated uses of the word "dick" and variations thereof. In context and as used in the complained of broadcasts, these were epithets intended to denigrate or criticize their subjects. Their use in this context was not sufficiently explicit or graphic and/or sustained to be patently offensive.").

cent.[191] "[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[192] Similarly, we find that the fact that these broadcasts did not dwell on the expletive, though relevant, is not dispositive under the circumstances presented here.

130. Third, the intentional use of a derivative of the "S-Word" on a popular network program broadcast is shocking and gratuitous. In this regard, ABC does not claim that there was any political, scientific or other independent value to using the word here, or any other factor to mitigate its offensiveness. To the extent ABC claims that the word was necessary for dramatic effect, mere dramatic effect does not justify use of patently offensive expletives during time periods when numerous children are likely to be in the audience. Programs utilizing patently offensive expletives for dramatic effect can be aired after 10 p.m.

131. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here that contained derivatives of the "S-Word" is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[193] Therefore,

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[191] 19 FCC Rcd at 4980 ¶ 12.

[192] *Id.*

[193] *See* 47 C.F.R. § 73.3999.

there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable.

132. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." We indicated in that decision that the Commission would analyze other potentially profane words on a case-by-case basis.

133. In this case, we find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

134. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[194] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case, the profane language may have had some communicative purpose, we do not believe that ABC has demonstrated that it was essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance. In this respect, this case is unlike *Saving Private Ryan*,

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[194] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

where we concluded that deleting offensive words "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." While we recognize that the expletives may have made some contribution to the authentic feel of the program, we believe that purpose could have been fulfilled and all viewpoints expressed without the broadcast of expletives.

135. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast, the material broadcast is legally actionable.[195]

136. ***No Sanction Proposed.*** In the instant case, we find that the ABC network affiliate Station KMBC-TV consciously and deliberately broadcast the material in question. Accordingly, we find that the apparent violations of 18 U.S.C. § 1464 and section 73.3999 of our rules were willful. The station aired indecent and profane material in violation of our rules because it broadcast indecent and profane words in a show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. The gratuitous use of indecent and profane language on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the *Golden Globe Awards Order*. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take indecency enforcement

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[195] *See ACT III*, 58 F.3d at 660-63.

action against the isolated use of expletives.[196] Thus, we will not impose any sanction in this case on the basis of our profanity finding. "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [ABC] and other licensees that broadcast the program prior to 10 p.m."[197] Accordingly, we find that no forfeiture is warranted in this case.

4. "The Early Show" (December 13, 2004)[198]

137. ***The Programming.*** A viewer filed a complaint that CBS Television Network ("CBS") affiliate Station KDKA-TV, Pittsburgh, Pennsylvania, licensed to CBS Broadcasting, Inc., aired a variant of the "S-Word" during the program "The Early Show" on December 13, 2004, at approximately 8:10 a.m., Eastern Standard Time, during a live interview with cast member Twila Tanner of the CBS program "Survivor: Vanuatu." The Bureau requested a tape of the program from CBS, which CBS submitted. The tape shows, and CBS does not dispute, that Ms. Tanner described a fellow contestant of "Survivor: Vanuatu" as a "bullshitter."[199]

138. ***Indecency Analysis.*** The Commission determined in the *Golden Globe Awards Order* that the "F-

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[196] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699).

[197] *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[198] FCC File No. EB-05-IH-0007.

[199] In commenting on the strategy employed by the fellow contestant, Ms. Tanner stated: "I knew he was a bullshitter from Day One." The interviewer, Julie Chen, recognized the inappropriateness of the language, stating: "I hope we had the cue ready on that one . . . . We can't say that word . . . . There is a delay."

Word" meets the first prong of the indecency test. We stated, "given the core meaning of the "F-Word," any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[200] Similarly, we now find that the "S-Word," including the variant of that word at issue here, is a vulgar, graphic, and explicit description of excretory material. Its use invariably invokes a coarse excretory image, even when its meaning is not the literal one. Accordingly, we must proceed to analyze whether the material, in context, is patently offensive as measured by contemporary community standards for the broadcast medium. Based on our examination of the three principal factors in our contextual analysis, we conclude that the material is patently offensive.

139. First, the complained-of material is vulgar, graphic, and explicit. Consistent with our analysis of the "F-Word" in the *Golden Globe Awards Order*, we find the "S-Word" to be one of the most vulgar, graphic and explicit words describing excrement or excretory activity in the English language and, for the reasons stated above, its use inherently has an excretory connotation. We conclude that the broadcast of the "S-Word," under the circumstances presented here, is vulgar, graphic and explicit.

140. Second, the fact that the material is not repeated or dwelled upon at length, while relevant, is not dispositive. As the Commission indicated in the *Golden Globe Awards Order*: "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently

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[200] *Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8.

offensive to the broadcast medium is not indecent."[201] Consequently, non-repetitive broadcasts of the "S-Word" may be found indecent.

141. Third, and most important to our analysis in this specific context, the use of the "S-Word," particularly during a morning news interview, is shocking and gratuitous.[202] Because the interview dealt with the outcome of one of the most popular prime-time shows on broadcast television among children, it is foreseeable that young children not only would be in the audience at that time of day, but also that they would be attentive listeners to the interview with Ms. Tanner. That CBS or the licensee of Station KDKA-TV failed to take measures to protect such viewers from vulgarity in a morning television interview is of particular concern and weighs heavily in our analysis.

142. Viewing the evidence as a whole, while Ms. Tanner's vulgarity is not repeated, the patently offensive nature of the broadcast is clearly established under the first and third principal factors of our contextual analysis. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[203] Therefore, there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable.

143. ***Profanity Analysis.*** In the *Golden Globe Awards Order*,, the Commission concluded that the "F-Word" constituted "profane language" within the mean-

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[201] *Id.*, 19 FCC Rcd at 4980 ¶12.

[202] *Id.*, 19 FCC Rcd at 4979 ¶9.

[203] *See* 47 C.F.R. § 73.3999.

ing of 18 U.S.C. §1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." In this case, we similarly find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. For the reasons stated above, use of the "S-Word" invariably invokes a coarse excretory image. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

144. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[204] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here. Although in this case, Ms. Tanner's profane language may have had some communicative purpose, we do not believe that it was essential to informing viewers on a matter of public importance or that editing the language would have materially impacted the network's function as a source of news and information.

145. ***No Sanction Proposed.*** We find that CBS Broadcasting, Inc., the licensee of CBS network affiliate Station KDKA-TV, consciously and deliberately broadcast the program in question. Accordingly, we find that the apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. Thus based upon our

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[204] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

review of the record in this case, we conclude that the licensee of this station aired material in violation of 18 U.S.C. § 1464 and our rules by broadcasting indecent and profane language between 6 a.m. and 10 p.m. during programming watched by a nationwide audience of all ages. The gratuitous use of indecent and profane language during a national broadcast ordinarily would warrant a forfeiture under the standards announced in *Golden Globe Awards Order*. However, we recognize that our precedent at the time of the broadcast did not clearly indicate that the Commission would take enforcement action against an isolated use of the "S-Word."[205] "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [CBS] and other licensees that broadcast the program prior to 10 p.m."[206] Consequently, we find that no forfeiture is warranted in this case.

C. Broadcasts That Do Not Violate Indecency/ Profanity/Obscenity Restrictions

146. In this section, we conclude that the complained-of programming does not warrant action against the licensee. Although some of this programming is undoubtedly upsetting to some viewers, we reach these determinations either because the programming is not within the scope of our indecency or profanity definitions or because it is not, in the contexts before us, patently offensive as measured by contemporary community standards for the broadcast medium.

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[205] *See Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[206] *Id.*

1. "Alias" (January 5, 2005)[207]

147. ***The Programming.*** The Commission received complaints concerning the January 5, 2005 broadcast of the program "Alias" by Allbriton Communications, Inc., licensee of Station WJLA-TV, Washington, D.C., from 9:00 to 11:00 p.m. Eastern Standard Time.[208] The show depicts intelligence agents engaged in various covert operations. In this episode, a male and female character engage in a covert operation on a moving train. The female character having completed her portion of the operation is chased by an assailant. The chase leads to a cargo car and, after a fight with the assailant, the female character finds herself hanging out of the cargo car while the train crosses a high bridge. As the assailant attempts to force the female character off of the moving train, the male character, having been victorious in a separate fight with another assailant, rescues the female character from impending death. The male and female characters hug and stare at each other. In the next scene, which is the subject of the complaints, the male and female characters are in bed kissing, caressing and rubbing against each other. The scene is accompanied by off-camera music. There are no depictions of sexual organs in the scene. Afterwards, the couple lay side-by-side and stare at each other.

148. ***Indecency Analysis.*** The episode's references to sexual activities place it within the subject matter scope

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[207] FCC File No. EB-05-IH-0351.

[208] The Commission received two complaints about this program. Neither complaint identified the specific broadcast station on which the program aired. However, we note that the program aired on the ABC Television Network and that both complaints were filed by individuals with addresses within the Washington, D.C. metropolitan area.

of our indecency definition. In particular, although there are no depictions of sexual organs, the episode depicts a couple in bed passionately kissing, caressing and rubbing against each other, each of which is a sexual activity. Accordingly, we find that the material meets the first prong of our indecency standard. We now turn to the second prong of our indecency analysis, whether the material is patently offensive by contemporary community standards for the broadcast medium.

149. Turning to the first of the three principal factors in our contextual analysis, the episode does not depict sexual or excretory organs and does not depict sexual activities in a graphic or explicit way. The scene involves no display of sexual organs and contains no sexually graphic language. While viewers see the characters kissing, caressing, and rubbing; it is not clear whether the characters are engaged in sexual intercourse.

150. Regarding the second principal factor of our contextual analysis, while not dispositive, the sexual encounter between the male and female character is not fleeting.[209]

151. With respect to the third principal component of our contextual analysis, we find that the sexual activity is not presented in a pandering, titillating or shocking manner. While the episode shows the male and female characters kissing, caressing, and rubbing in bed, the overall context, including the camera angle, the background music, and the immediately preceding scene, is not shocking in contrast to clear and graphic depictions of sexual intercourse.

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[209] Because this scene aired prior to 10 p.m., it falls within the scope of our indecency regulation.

152. Accordingly, although the episode depicts sexual activities within the meaning of the Commission's indecency definition, taken as a whole, we conclude that it is not patently offensive as measured by contemporary community standards for the broadcast medium. While the sexual encounter between the two characters is not fleeting, the nature of the encounter is not sufficiently explicit or shocking to be patently offensive. Accordingly, the complaints are denied.

2. "Will and Grace" (November 11, 2004)[210]

153. ***The Programming.*** The Commission received a complaint concerning the November 11, 2004 broadcast of a "Will and Grace" episode titled "Saving Grace Again, Part 1." The episode was broadcast at 8:30 p.m. Central Standard Time over stations affiliated with the NBC Television Network. In the episode, the lead female character, Grace, is in her apartment preparing to go out on her first date after her recent divorce. She is being assisted by her roommate, Will, and is concerned about her appearance. Before leaving, she asks Will if there is "anything else" she should know about dating. Will responds by instructing her to "lean forward" and, as Grace does so, he places his hands on her dress adjusting her breasts upward to enhance her appearance. As Grace is leaving the apartment, she is greeted at the elevator by her friend, Karen, who also knows of the date and places her hand on Grace's breasts and appears to also adjust her bosoms upward.[211]

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[210] FCC File No. EB-05-IH-0049.

[211] The following dialogue occurs:

Karen: "Hey, hey come here, one more thing come here."

Grace: "Will already adjusted them."

154. ***Indecency Analysis.*** The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs and, therefore, is within the subject matter scope of the Commission's indecency definition. Although the episode contains some sexual innuendo, the characters in the scene in question appear to touch Grace's breast area primarily to enhance her appearance during her date rather than to elicit a sexual response. We need not decide, however, whether the scene depicts or describes sexual activities or organs because even assuming that the first prong of our indecency analysis is met, we conclude that the material is not indecent because it is not patently offensive as measured by contemporary community standards for the broadcast medium.

155. In making this determination, we must look to the full context in which the material is presented. Here, the context is generally humorous and consists of light-hearted ridicule and indirect references to the size of Grace's breasts and the efforts made by her friends to enhance her sexual appeal for her date by making her breasts look larger.

156. Regarding the first component of our contextual analysis, the touching of Grace's breasts is not presented in a graphic or explicit manner. The program contains no nudity and never explicitly shows or specifically describes sexual activities or organs. We find that the episode does not contain "graphic descriptions of

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Karen: "I wasn't adjusting them."

sexual activities and organs or . . . language that is so graphic as to qualify as indecent and profane."[212]

157. With respect to the second component of our contextual analysis, while not dispositive, we find it relevant that the episode does not dwell upon or repeat references to sexual organs or activities.

158. Finally, we do not find that the material at issue is used to pander, titillate, or shock—the third component of our contextual analysis. Rather, the episode addresses the anxiety associated with a first date and Grace's friends' efforts to lend assistance—a topic that is not shocking, pandering, or titillating. Moreover, the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace.

159. In sum, we find that, because of the absence of explicit portrayals of, or references to, sexual organs or activities; the brevity of the scene at issue; and the absence of shocking, pandering, and/or titillating effect, the episode, taken as a whole, is not patently offensive as measured by contemporary community standards for the broadcast medium, and therefore is not indecent. Accordingly, the complaint is denied.

3. "Two and a Half Men" (February 21, 2005)[213]

160. ***The Programming.*** The Commission received a complaint that the February 21, 2005 episode of the CBS Television Network program "Two and a Half Men" had

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[212] *NBC Telemundo License Co.*, Memorandum Opinion and Order, 19 FCC Rcd 23025, 23027 ¶ 7 (2004) ("*Coupling MO&O*") (denying complaints about sexual references during the program "Coupling").

[213] FCC File Nos. EB-05-IH-0515, EB-05-IH-0570.

a scene in which a female doctor "was doing a hernia check" on a male character "with his scrotum in her hand" while he was trying to seduce her.[214] The broadcast occurred between 9 and 10 p.m. Eastern Standard Time. Based on our review of a videotape provided by CBS, the scene in question takes place in a doctor's office and involves a hernia examination, which requires the male character to remove his pants and cough with the female doctor's hand on his scrotum. No nudity or touching, however, is actually depicted, and the examination is not eroticized. During the examination, to which the male character readily agrees because he apparently finds the doctor attractive, he comments suggestively that her hands are warm and asks her out to dinner. She expresses disbelief that he does not remember her and states that they dated while she was in medical school until he broke it off without explanation and began seeing her roommate. The scene ends with him making comments and sounds indicating that she is painfully squeezing his scrotum.

161. ***Indecency Analysis.*** After reviewing a tape of the complained-of scene, we conclude that it is not indecent. Even assuming that the scene that the complain-

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[214] The complainant also generally alleges that "Two and a Half Men" episodes are "raunchy" with "a lot of talk about 'humping.'" In order for us to process an indecency complaint, the complaint must identify a specific broadcast containing allegedly indecent material. We cannot prosecute complaints about programs in general. The First Amendment to the United States Constitution and section 326 of the Act prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression. *See* 47 U.S.C. § 326. Moreover, we previously rejected complaints regarding an episode of the program "Will and Grace" that made similar allegations. *See KSAZ MO&O*, 19 FCC Rcd at 16001, ¶6.

ant describes falls within the scope of our indecency definition, it does not, in the context at issue here, satisfy the second prong of our indecency analysis—that is, it is not patently offensive under contemporary standards for the broadcast medium.

162. Looking at the three principal factors that inform our contextual analysis, first, the material is not graphic or explicit. Although the episode suggests that one character is touching another's sexual organs, the apparent touching takes place off-camera; there is never any nudity, depiction of a sexual organ, or description of sexual organs or activities. Rather, viewers are left to surmise what is happening by one character's reactions to another. Turning to the second factor, while not dispositive, it is relevant that the scene at issue is not sustained or repeated. Finally, we do not believe the material shocks, panders, and/or titillates the viewing audience. As noted, actual touching of the male character's sexual organs is not depicted or described. Although the male character makes some mildly suggestive remarks to the doctor during the examination, the exam is not eroticized or presented in a manner that shocks, panders , or titillates the audience. We conclude, based on our examination of these three factors, that the scene in question is not patently offensive under contemporary standards for the broadcast medium, and therefore is not indecent. Accordingly, we deny the complaint.

4. "Committed" (March 8, 2005)[215]

163. ***The Programming.*** The Commission received a complaint that the March 8, 2005 episode of the NBC Television Network program "Committed" had a scene

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[215] FCC File No. EB-05-IH-0257.

"set in a gymnasium full of children" in which a woman is "grabbing the genitals of a man while he sang the national anthem." The broadcast occurred between 6 a.m. and 10 p.m. Eastern Standard Time. Our review of a videotape of the episode indicates that the episode does not show the woman touching the man's genitals—the touching is only suggested—and the suggested touching is not sexual in nature, but apparently intended by the female character to help the man hit the high notes of the national anthem.

164. ***Indecency Analysis.*** Based on our review of the tape of this episode, we conclude that it is not indecent. Even assuming that the scene the complainant describes is within the scope of our indecency definition, we conclude that it does not satisfy the second prong of our indecency analysis—that is, it is not patently offensive under contemporary standards for the broadcast medium.

165. Looking at the three principal factors that inform our contextual analysis, first, the material is not graphic or explicit. Although the episode suggests that one character is touching another's sexual organs, no touching is ever shown, and there is no nudity, depiction of a sexual organ, or description of sexual activity. Rather, viewers are left to surmise what is happening by one character's reactions to another. Turning to the second factor, while not dispositive, it is relevant that the scene at issue is not sustained or repeated. Finally, we do not believe the material shocks, panders, and/or titillates the viewing audience. Rather, it is not presented in a sexual manner. As noted, the touching is only suggested or implied, and neither the detail nor the tone of the scene makes it "shocking" or "titillating." We con-

clude, based on our examination of these three factors, that the program in question is not patently offensive under contemporary standards for the broadcast medium, and therefore is not indecent. Accordingly, we deny the complaint.

5. "Golden Phoenix Hotel & Casino Commercial" (February 19, 2005)[216]

166. ***The Programming.*** The Commission received a complaint concerning a commercial for the Golden Phoenix Hotel and Casino, located in Reno, Nevada, broadcast on February 19, 2005 by Sierra Broadcasting Company ("Sierra"), licensee of Station KRNV(TV), Reno, Nevada. The advertisement features a hotel show entitled "Perfect 10." It begins with ten women in casino show-style costumes suddenly jumping onto the bed of a fully clothed man who has been reading "Perfect 10" magazine, then features excerpts of singing and dancing from the show mixed with graphics, and ends with a brief view of the man alone on the bed with his partially bare upper torso and face covered by lipstick kisses. The voice-over describes the concept and content of the show and its male star (who is not the man in bed) and identifies the hotel. The complainant describes the bed scenes as "a mostly naked man laying in bed with . . . almost completely naked women exposing their breasts and other body parts [and] acting in a truly obscene and sexual manner." The complainant alleges that the commercial is obscene and briefly enumerates the criteria for that finding.

167. ***Obscenity Analysis.*** We do not find the complained-of material obscene. Although the material does

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[216] FCC File No. EB-05-IH-0314.

suggest sexual activity, the mere suggestion of such activity does not render material obscene. Obscene material, which is not protected by the First Amendment and may not be broadcast at any time, is defined by a three-prong test set forth by the Supreme Court in *Miller v. California*: (1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.[217] All three prongs of this test must be met before the material may be found to be obscene. This test is designed "to isolate 'hard core' pornography from expression protected by the First Amendment."[218] Based on our review, the advertisement at issue clearly does not constitute the type of "hard core pornography" covered by *Miller*.

168. ***Indecency Analysis.*** The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs and, therefore, is within the subject matter scope of the Commission's indecency definition. Even assuming that the advertisement's suggestion of sexual activity meets the first prong of our indecency analysis, however, we conclude that it is not indecent because it is not patently offensive as measured by contemporary community standards for the broadcast medium.

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[217] 413 U.S. at 24.

[218] *Id.* at 29.

169. Turning to the first principal factor in our contextual analysis, we find that the material at issue is neither explicit nor graphic. In the first bed scene, the man is shown fully clothed on top of the bed, and the women's costumes, though sexually suggestive, do not actually display their sexual organs. Likewise, the women put their arms around the man in a manner that is suggestive rather than explicit or graphic. The second bed scene merely shows the man alone from the waist up, with his shirt unbuttoned and lipstick marks on his face, without depicting sexual activity or organs.

170. Concerning the second principal factor of our contextual analysis, the material at issue is repeated or dwelled upon in the sense that there are two bed scenes, one at the beginning of the advertisement and one at the end. Note, however, that this factor is not dispositive. "No single factor generally provides the basis for an indecency finding."[219]

171. Finally, with respect to the third factor of our contextual analysis, it does not appear that the bed scenes at issue shock, pander to, or titillate the viewing audience. No sexual acts or organs are shown. Among other things, no sexual acts or organs are shown, the voice-over is not explicitly sexual, and the camera angles do not present the material in a pandering manner.

172. Viewing the advertisement as a whole, we conclude that it is not patently offensive. Although the bed scenes are repeated, this factor is outweighed, in this particular context, by the absence of any graphic or explicit portrayal of sexual activities or organs and our finding that it is not shocking, pandering to, or titillat-

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[219] *Indecency Policy Statement*, 16 FCC Rcd at at 8003 ¶ 10.

ing. Therefore, we conclude that the advertisement is not indecent, and the complaint is denied.

6. "The Oprah Winfrey Show" (March 18, 2004)[220]

173. ***The Programming***: The Commission received numerous complaints about the discussion of teenage sexual practices contained in the March 18, 2004 episode of the syndicated television program "The Oprah Winfrey Show." This particular episode included an examination by the host and her guests and audience of serious parental/supervisory issues including the complained-of discussion arising from the movie "Thirteen." The complaints cite the following discussion, which we verified from an official transcript of the program:

> WINFREY: Yeah. So you say—let's talk about that secret language, Michelle.
>
> Ms. BURFORD: Yes.
>
> WINFREY: I didn't know any of this.
>
> Ms. BURFORD: I have—yeah, I have—I've gotten a whole new vocabulary, let me tell you.
>
> WINFREY: I did not know any of this. Does this—does this mean I am no longer hip?
>
> Ms. BURFORD: Salad-tossing. I'm thinking cucumbers, lettuce, tomatoes. OK? I am definitely not hip.

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[220] FCC File No. EB-04-IH-0081.

WINFREY: OK—so—OK, so what is a salad toss?

Ms. BURFORD: OK, a tossed salad is—get ready; hold on to your underwear for this one—oral anal sex. So oral sex to the anus is what tossed salad is. Hi, Mom. OK. A rainbow party is an oral sex party. It's a gathering where oral sex is performed. And a—rainbow comes from—all of the girls put on lipstick and each one puts her mouth around the penis of the gentleman or gentlemen who are there to receive favors and makes a mark in a different place on the penis, hence the term rainbow. So . . .

WINFREY: OK. And so what does pre—so what does pretty boy mean? A pretty boy.

Ms. BURFORD: Pretty boy is a sexually active boy, someone who's been fairly promiscuous. So it isn't maybe what you would have thought pretty boy meant in your time.

WINFREY: And dirty means what? Does dirty mean . . .

Ms. BURFORD: Dirty means a diseased—means a diseased girl. And along with that the term that some teens are using to mean HIV is High Five, 'high' and then the Roman numeral 'V.' High Five. So if you got High-Fived by Jack, you got diseased by Jack. You got—you got HIV.

WINFREY: It means he gave you HIV.

Ms. BURFORD: He gave you HIV. Yeah.

WINREY: Yeah. OK. And boo—booty call is pretty common, right?

Ms. BURFORD: Yeah, that's—yeah, that's pretty pervasive. Yeah, that's an early morning or late-at-night call for sex that involves no real relationship. Maybe 2 AM, guy calls girl, and says, 'Meet me at so and so location, we have sex, we leave,' booty call. You all got that?

174. ***Indecency Analysis.*** There can be no question that the complained-of dialogue describes sexual activities, and therefore falls within the subject-matter scope of our indecency analysis. We thus turn to the second prong of our indecency analysis—a determination of whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium.

175. Turning to the first factor in our contextual analysis, the broadcast here clearly describes sexual practices in very specific terms, and is highly graphic and explicit.

176. With respect to the second factor, the dialogue is not brief, but continues at length.[221] Indeed, the title of the segment is "The Secret Language of Teens," and the discussion of these terms for sexual activity is the subject of the entire segment.

177. Given this particular context, though, our findings with regard to the first two factors of our analysis

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[221] *Indecency Policy Statement*, 16 FCC Rcd at 8008, ¶ 17 (stating that "[r]epetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts").

are outweighed by our conclusion under the third factor of our contextual analysis that the complained-of material, in context, is not pandering and is not used to titillate or shock.

178. The program segment focuses on the "secret lives" of many teenagers. Through guests—parents, teenagers, and others—serious discussions take place about the disturbing, secret teenage behavior portrayed in the movie "Thirteen." Guests speak of serious, potentially harmful behaviors of teens—such as drug use, drinking, self-mutilation, and sexual activity, how teenagers hide those behaviors from their parents, and how parents might recognize and address those behaviors with their teens. The material is not presented in a vulgar manner and is not used to pander to or titillate the audience. Rather, it is designed to inform viewers about an important topic. To the extent that the material is shocking, it is due to the existence of such practices among teenagers rather than the vulgarity or explicitness of the sexual depictions or descriptions. It would have been difficult to educate parents regarding teenagers' sexual activities without at least briefly describing those activities and alerting parents to the little-known terms (*i.e.*, "salad tossing," "rainbow party") that many teenagers use to refer to them.[222] For many of the same reasons, we have previously denied complaints about similar educational broadcasts.[223]

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[222] *See Saving Private Ryan*, 20 FCC Rcd at 4513 ¶ 14 (noting that "[i]n short, the vulgar language here was not gratuitous and could not have been deleted without materially altering the broadcast").

[223] *See King Broadcasting Co. (KING-TV)*, Memorandum Opinion and Order, 5 FCC Rcd 2971, ¶ 13 (1990) (finding that although a program dealt explicitly with teenage sexual issues and included very graphic sex organ models, "the material presented was clinical or instru-

179. As we have previously stated, "the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding."[224] Here, in light of the overall context of the broadcast, we find that the complained-of material is not patently offensive as measured by contemporary community standards for the broadcast medium, and, therefore, not indecent.

7. Political Advertisement (October 14, 2004)[225]

180. ***The Programming.*** The Commission received a complaint regarding a political advertisement that was aired by Multimedia KDSK, Inc., licensee of Stations KDSK-TV and KDNL-TV, St. Louis, Missouri, between 5:00 and 7:00 p.m. on October 14 and 15, 2004. The advertisement, sponsored by the Illinois Democratic Party and the Maag for Justice political campaign, was aired during the Illinois judicial election cycle. The complainant alleges—and our review of photographic stills from the advertisement confirms—that the spot included references to rape and sodomy in criticizing the competence of another candidate in the race for a seat on the Supreme Court of Illinois.[226] The complainant argues

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mental in nature and not presented in a pandering, titillating or vulgar manner"); *see also Indecency Policy Statement*, 16 FCC Rcd at 8011-12 ¶ 21 (citing to staff decisions in which episodes of the "Oprah Winfrey Show" and "Geraldo Rivera Show" were found not indecent).

[224] *Id.*, 16 FCC Rcd at 8010 ¶ 20.

[225] FCC File No. EB-05-IH-0223.

[226] The photographic stills and text of the advertisement can be found at http://www.brennancenter.org/programs/downloads/buying time_2004/STSUPCT_IL_DPIL_KARMEIER_CHILDREN.pdf. The ad begins with a picture of a schoolyard through a chain-link fence, then

that this advertisement contains prurient speech, falls outside the First Amendment protections of the Constitution of the United States, and should not have aired at a time when children were watching television.

181. ***Obscenity Analysis.*** Although the complainant does not explicitly claim that the advertisement is obscene, we read his allegation that the spot contains prurient speech and is without First Amendment protection as an allegation that it is obscene. We find, however, that the complained-of material is not obscene. Although the material does refer to sexual activity, the mere mention of such activity does not render material obscene.[227] Obscene material, which is not protected by the First Amendment and may not be broadcast at any time, is defined by a three-prong test set forth by the Supreme Court in *Miller v. California*: (1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient

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shows a blurred image of a home, then superimposes a copy of the judicial decision over the home, then adds a picture of Judge Karmeier, and concludes with a picture of a jail cell, with Judge Karmeier's picture superimposed upon it. The narrator states:

> He used candy to lure the children into the house. Once inside, the three children were sexually molested. A four-year old girl raped. Her brothers-sodomized. A Belleville man was arrested and convicted for the crime after trying to develop pictures of the abuse. Despite prosecutor's objections, Judge Lloyd Karmeier gave him probation, saying "The court should grant leniency . . . " Another case where Karmeier let a violent criminal out into the community. Lloyd Karmeier—the wrong choice for Supreme Court. Paid for by the Democratic Party of Illinois.

[227] *See WGBH Educational Foundation, Memorandum Opinion and Order*, 69 FCC 2d 1250, 1253-54 (1978) ("*WGBH MO&O*") (finding that offensive language, including expletives, does not fit within the established definition of obscenity).

interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.[228] This test is designed "to isolate 'hard core' pornography from expression protected by the First Amendment."[229] All three prongs of this test must be met before the material may be found to be obscene.

182. The material at issue here is not obscene because it does not meet the three-part definition articulated in *Miller v. California*. Although the advertisement discusses a criminal sexual assault, it is a political ad in a hotly contested judicial election and therefore, taken as a whole, it is not without serious political value. Because the material does not meet the third prong of the *Miller* definition, it is not obscene and it is not necessary to consider the other two prongs of the definition.[230]

183. ***Indecency Analysis.*** Turning to our indecency analysis, we find that the complained-of material describes sexual activity by referencing rape and sodomy, thereby satisfying the first prong of our indecency analysis. We next turn to the second prong of our indecency analysis—a determination of whether the material at

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[228] 413 U.S. at 24.

[229] *Id.* at 29.

[230] *Id.* at 23-24. *See Roth*, 354 U.S. 476; *but see Petition for Declaratory Ruling Concerning Section 312(A)(7) of the Communications Act*, Declaratory Ruling, 9 FCC Rcd. 7638 (1994), *reversed on other grounds sub nom Becker v. FCC*, 95 F.3d 75 (1996) (finding that campaign advertisements containing graphic abortion imagery were, in context, part of important political debate and thus were not indecent) ("*1994 Declaratory Ruling*").

issue was patently offensive as measured by contemporary community standards for the broadcast medium.

184. After reviewing the material, we find that the advertisement is not explicit or graphic, the first factor we must consider in our contextual analysis to determine whether material is patently offensive. The advertisement references rape and sodomy of children without supplying any detailed description or depiction. These references are significantly less graphic than other instances where political advertisements were considered "graphic" but not indecent.[231]

185. Next, we examine the second factor in our contextual analysis: whether the material is repeated or dwelled upon. We find that rape and sodomy are each referenced only once in the advertisement, which therefore does not repeat or dwell upon these subject areas. After citing these criminal acts, the advertisement moves on to discuss the sentence delivered to the perpetrator by one of the judicial candidates.

186. Finally, we assess whether the material is used in a pandering, shocking or titillating manner. The advertisement calls attention primarily to the judgment of a judicial candidate, and mentions predatory sexual activities to call into question the candidate's judgment in sentencing a criminal. We do not consider such references pandering or titillating. While references to rape and sodomy are shocking, particularly when they involve children, we find that, on balance, the advertisement advocates against a particular judicial candidate rather

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[231] *Id.* at 7643 (depicting dead or aborted and bloodied fetuses in campaign advertisements was graphic, but not indecent).

than shocks, panders to, or titillates the audience.[232] In other words, to the extent that the material has "shock" value, it is not related to sexual or excretory activity but to the judge's allegedly "soft attitude" on crime.

187. In this case, we find that all three of the principal factors in our contextual analysis weigh in favor of a finding that the complained-of material is not patently offensive as measured by contemporary community standards for the broadcast medium. While the references in this political advertisement to rape and sodomy were understandably upsetting to some viewers, subject matter alone does not render material indecent.[233] Therefore, we conclude that this advertisement is not indecent. Accordingly, we deny the complaint.[234]

8. "The Amazing Race 6" (December 21, 2004)[235]

188. ***The Programming.*** "The Amazing Race 6" is a CBS Television Network ("CBS") program in which two-person teams race around the world for a cash prize. The Commission received a complaint regarding the December 21, 2004 broadcast of the program by CBS affiliate Station KYW-TV, Philadelphia, Pennsylvania, licensed to CBS Broadcasting, Inc. According to the complaint, "[m]idway through that episode, my nine-year-old daughter asked me what was written on the side of a bus that the contestants were embarking upon.

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[232] *Id.*

[233] *See Indecency Policy Statement*, 16 FCC Rcd at 8011 ¶ 21.

[234] Because we find that the advertisement is not indecent, we need not decide whether the Commission may propose forfeitures against licensees that broadcast indecent political advertisements outside of the safe harbor. *See generally Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996).

[235] FCC File No. EB-05-IH-0394.

She stated that she thought that was a bad word that she was not supposed to say. Sure enough, the words 'FU** COPS' was [sic] visible on the side of the bus near the door where the contestants are getting on the bus."

189. The Bureau obtained a videotape of the subject episode from CBS which confirms that, during a scene in which two of the contestants leave a train, the camera shot briefly includes some graffiti stating "Fuck Cops!" The graffiti is spray-painted in small white letters on the train's side.

190. ***Indecency Analysis.*** We held in the *Golden Globe Awards Order* that, given the core meaning of the "F-Word," any use of that word inherently has a sexual connotation and falls within the first prong of our indecency definition.[236] The complained-of material here is language that we have found inherently describes sexual activity. The material, therefore, warrants further scrutiny to determine whether it was patently offensive as measured by contemporary community standards for the broadcast medium.

191. Looking at the three principal factors that comprise our contextual analysis, we note first that, although the "F-Word" is depicted in the program, the image is not graphic or explicit. The graffiti is small, out of focus, and difficult to read. Unless one is looking directly at or for the words, the average viewer would not even notice the graffiti. Second, while not dispositive, it is relevant that the material is not repeated or dwelled upon. Indeed, the image is displayed only momentarily. Finally, the shot of the graffiti is not shocking, pander-

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[236] *See Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8; *see also Pacifica Foundation*, 56 FCC 2d at 99.

ing, or titillating because it is barely visible. Indeed, the average viewer would not have noticed the graffiti. Since each of the three factors examined above weighs against a finding of patent offensiveness, we conclude that the material is not patently offensive and therefore not indecent.

192. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, we found that the "F-Word" constituted profane language within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[237] Based upon our review of the record in this case, however, we conclude that CBS did not air profane material in violation of 18 U.S.C. § 1464. As we have indicated elsewhere in this Order, we believe that the "F-Word" is presumptively profane because it is so grossly offensive as to constitute a nuisance.[238] This, however, is one of the rare instances in which this presumption is effectively rebutted. Unlike the broadcast spoken utterance of the "F-Word" at issue in the *Golden Globes Award Order*, the written version of the word during this broadcast, for the reasons mentioned above, would not have been noticed by the average viewer. As such, we find it impossible to conclude that its broadcast was "likely to shock the viewer and disturb the piece and quiet of the home"[239] and thus amount to a nuisance. For all of these reasons, we find that the broadcast is not profane, and the complaint is denied.

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[237] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶¶ 13-14.

[238] *Id.* at 19 FCC Rcd at 4980 ¶ 12 (citing *Tallman v. United States*, 465 F.2d 282, 285 (7th Cir. 1972)).

[239] *See supra* ¶ 19.

9. Various Programs Containing Expletives (various dates between August 31, 2004 and February 28, 2005)

193. ***The Programming.*** The Commission has before it twenty complaints concerning programming that contains the following allegedly obscene, indecent, or profane words and phrases: "hell," "damn," "bitch," "pissed off," "up yours," "ass," "for Christ's sake," "kiss my ass," "fire his ass," "ass is huge," and "wiping his ass." We conclude that, while these words and phrases are understandably upsetting to some viewers, in the contexts used here, they are neither obscene, indecent, nor profane. The complaints include:

(a) an October 19, 2004, complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged October 18, 2004 broadcast of "The Simpsons" program, in which the phrases "up yours," and "hell" were allegedly aired between 7:00 and 7:30 p.m. The complainant believes that the material was "obscene."[240]

(b) a November 4, 2004 complaint against TVT License, Inc., licensee of Station WTVT(TV), Tampa, Florida, for a November 4, 2004 broadcast of the "North Shore" program, in which the words "bitch" and "hell" were allegedly broadcast during an unspecified time period. The complainant believes that the material was "profane."[241]

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[240] FCC File No. EB-05-IH-0316.

[241] FCC File No. EB-05-IH-0317.

(c) a November 18, 2004 complaint against KTVI License, Inc., licensee of Station KTVI(TV), St. Louis, Missouri, for its alleged October 26, 2004 broadcast of the "Father of the Pride" program, in which the phrases "damn," "hell," and "my ass is huge," were allegedly aired at approximately 8:00 p.m.[242] The complainant believes that the material "lacks serious literary, artistic, political or scientific value and meets the standard of the prohibition issued by the FCC."

(d) a September 22, 2004 complaint against Meredith Corporation, licensee of Station WSMV-TV, Nashville, Tennessee, for its alleged August 31, 2004 broadcast of the "Father of the Pride" program, in which the phrases "bitch" and "slutty sister" were used and "an animal trainer was accosted by a sexually aroused chimpanzee."[243] The complainant further alleges that a sexual double-entendre was made through the animated lion character's statement "'Big Daddy's ready for lovin' . . . it may be nine o'clock in New York, but right here it's mountin' time.'" The complainant alleges that the material is indecent.

(e) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged October 25, 2004 broadcast of the "Girlfriends" program, in which the word "ass" was allegedly aired during

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[242] FCC File No. EB-05-IH-0385.

[243] FCC File No. EB-04-IH-0459.

the 9:00 to 9:30 p.m. time period.[244] The complainant believes that the material was "offensive."

(f) an undated complaint against an unspecified UPN affiliate for its alleged November 29, 2004 broadcast of the "Half and Half" program in which the word "damn" was allegedly aired during the 9:00 to 9:30 p.m. time period.[245] The complainant believes that the material was "profane."

(g) a December 20, 2004 complaint against an unspecified UPN affiliate for its alleged December 20, 2004 broadcast of the "Second Time Around" program in which the phrases "get your ass out here," "I gave you the damn keys," and "damn flashlight" were allegedly aired at approximately 9:50 p.m.[246] The complainant believes that the material was both "profane" and "obscene."

(h) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged December 1, 2004 broadcast of the "America's Next Top Model" program in which the words "ass" and "bitch" were allegedly aired during the 8:00 to 9:00 p.m. time period.[247] The complainant believes that the material was "profane."

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[244] FCC File No. EB-05-IH-0318.

[245] FCC File No. EB-05-IH-0421.

[246] FCC File No. EB-05-IH-0428.

[247] FCC File No. EB-05-IH-0420.

(i) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged December 21, 2004 broadcast of the "Family Matters" program in which the word "hell" was allegedly aired during the 10:30 and 11:00 a.m. time period.[248] The complainant believes that the material was both "obscene" and "profane."

(j) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged broadcast of the "Cuts" program on February 28, 2005 during which the words "ass" and "damn" were allegedly aired during the 8:30 to 9:00 p.m. time period.[249] The complainant believes that the material was "inappropriate."

(k) an undated complaint against McGraw-Hill Broadcasting Company, Inc., licensee of Station KMGH-TV, Denver, Colorado, for its alleged broadcast of an unspecified program on January 25, 2005 during which the phrases "my Mom's been wiping his ass," "he said his parents would fire her ass," and "a pissed-off ex-employee" were allegedly aired during the 9:00 to 10:00 p.m. period.[250] The complainant believes that the material was "obscene," "indecent" and "profane."

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[248] FCC File No. EB-04-IH-0422.

[249] FCC File No. EB-05-IH-0423.

[250] FCC File No. EB-05-IH-0696.

(l) an April 23, 2005 complaint against TVT License, Inc., licensee of Station WTVT(TV), Tampa, Florida, for a December 9, 2004 broadcast of the "North Shore" program, in which the words "ass" and "hell" were allegedly broadcast between 9 and 10 p.m.. The complainant believes that the material was indecent.[251]

194. ***Obscenity Analysis.*** We deny the complaints to the extent that they allege the foregoing broadcasts are obscene.[252] The three-part obscenity test set forth in *Miller v. California* requires that (1) an average person, applying contemporary community standards, would find that the material, as a whole, appeals to the prurient interest; (2) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.[253] This test is designed "to isolate 'hard core' pornography from expression protected by the First Amendment."[254] Nothing in the record indicates that the foregoing broadcasts depict the kind of "hard core pornography" covered by *Miller*, or that, *as a whole*, they

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[251] FCC File No. EB-05-IH-0417.

[252] The allegations of obscenity concern, specifically, the phrases "up yours," "hell," "get your ass out here," "I gave you the damn keys," "I was holding the damn flashlight," "my Mom's been wiping his ass," "kiss my ass," "his parents would fire his ass," and "either that or a pissed-off ex-employee."

[253] 413 U.S. at 24.

[254] *Id.* at 29.

appeal to the prurient interest or lack serious literary, artistic, political, or scientific value.[255]

195. ***Indecency Analysis.*** Although only three complaints explicitly allege that the cited material is indecent,[256] we will perform our indecency analysis on all the allegations about offensive language. Several of the complaints cite similar terms without providing any context. For example, complainants challenge uses of the words "up yours," "ass," "hell," "damn," and "bitch."[257] One complaint, about Station WSMV-TV's August 31, 2004 broadcast of an episode of "Father of the Pride," concerns references to an animated character's sister being "slutty," and to various sexual acts, including animal sex and bestiality.[258] Another complaint, against Station KMGH-TV, concerns the phrases "my Mom's been wiping his ass," and "he said his parents would fire her ass," and "either that or a pissed-off ex-employee."[259]

196. The words "hell," "bitch," "slutty," and "damn" do not refer to sexual or excretory organs or activity and therefore fall outside the subject matter scope of our indecency rules. We will assume *arguendo* that the remaining allegations describe or depict sexual or excretory organs or activities and therefore fall within the subject matter scope of our indecency rules. Specifically, the word "ass," and the phrases "wiping his ass"

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[255] *See WGBH MO&O*, 69 FCC 2d at 1253-54 (finding that offensive language, including expletives, does not fit within the established definition of obscenity).

[256] *See supra* ¶ 193(c), (e), and (j).

[257] *See supra* ¶ 193(a)-(c), (e)-(j), (l).

[258] *See supra* ¶ 193(d).

[259] *See supra* ¶ 193(k).

and "fire her ass," in the context of the programs, refer to the buttocks, which are sexual and excretory organs.[260] Likewise, the term "pissed off" is a derivative of "piss," which refers to the act of urination. Moreover, the references to sexual acts, including animal sex and bestiality, describe sexual activity. Although the phrase "up yours" is more vague, the speaker arguably is referring to a sexual or excretory organ of the listener. Thus, we must proceed to determine whether these terms or references are patently offensive as measured by contemporary community standards for the broadcast medium under the second step of our indecency analysis.

197. We find that, although the complained-of word "ass," and the phrases "up yours," "my ass is huge," "wiping his ass," "fire her ass, and "pissed off" are coarse expressions, in the context presented, they are not sufficiently vulgar, graphic, or explicit to support a finding of patent offensiveness. To the extent the complaints describe the context in which the word "ass" is used, it is used in a nonsexual sense to denigrate or insult the speaker or another character. The word "piss" is used as part of a slang expression that means "angry." The word "ass" and the phrase "pissed off" do not invariably invoke coarse sexual or excretory images, and in the context presented they do not rise to the level of offensiveness of the "F-Word" or "S-Word." Moreover, while not dispositive, none of these complaints suggest that the remarks are repeated or dwelled upon. Although the phrases may have a marginally shocking effect, that impact is not so marked as to convince us that the overall context of the broadcast was indecent. Moreover, we note that last year we found that the fleeting use of

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[260] *See supra* note 97.

some of these same terms was not indecent in the contexts presented.[261] The manner in which these terms are used in the complained-of broadcasts resembles that presented in our previous decisions. Therefore, based on our precedent, the complained-of broadcasts are not indecent.

198. With regard to the remaining allegations in the complaint against the August 31, 2004 episode of "Father of the Pride," we find that the material is not indecent. First, the animated lion character's utterance of the phrase "it's mountin' time," although apparently used as a sexual reference, is not, in the context of the instant broadcast, sufficiently explicit or graphic to be deemed patently offensive. While the animated imagery accompanying the lion character's comment does portray him making a circular pelvic motion while uttering the phrase "mountin' time," it does not contain any depiction of sexual organs or explicit sexual acts. Moreover, the sexual reference is neither repeated nor dwelled upon, and is not shocking, pandering, or titillating. Similarly, we find no merit to the allegation that the material visually depicting "an animal trainer [being] accosted by a sexually aroused chimpanzee" is indecent. Contrary to the complainant's allegation of portrayed bestiality, the scene in question depicts the effect

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[261] *See PTC 1*, 20 FCC Rcd at 1926, ¶ 8 (finding that, in context, fleeting uses of words including "bitch" and "ass" not sufficiently explicit or graphic to support a finding of patent offensiveness); *PTC 2*, 20 FCC Rcd at 1938 ¶ 8 (finding that, in context, words including "hell," "damn," "pissed," "bitch," not sufficiently explicit or graphic to support a finding of patent offensiveness). We note that, in contrast, in *Golden Globe Awards*, 19 FCC Rcd at 4979 ¶ 9, we found that a single use of the "F-Word" during the live broadcast of an awards ceremony was explicit and graphic because "its use invariably invokes a coarse sexual image."

of a trainer's application of animal pheromones, apparently arousing a chimpanzee to attempt to caress and nuzzle him. It does not contain any depiction of sexual organs or sexually explicit acts and is not titillating or shocking. Consequently, we find that the foregoing material, while offensive to some viewers, is not patently offensive under our indecency standard.

199. ***Profanity Analysis.*** Several of the complaints allege that the use of the words "bitch," "hell" or "damn," or phrases including their variants, are profane. These words are not sexual or excretory terms, and thus are presumed not to be profane.[262] On the other hand, the words "ass" and "piss" and their derivatives do describe sexual or excretory activities. As noted above, we discussed these terms in two decisions last year, finding that neither was not sufficiently graphic or explicit in context to be indecent,[263] and further holding that the term "pissed" was not profane in the context presented.[264] Similarly, we conclude that the use of these terms here in context is not so grossly offensive to members of the public as to amount to a nuisance and thus be deemed profane. Accordingly, we deny the complaints.

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[262] *See supra* ¶ 18.

[263] *See PTC 1*, 20 FCC Rcd at 1926, ¶ 8 (finding that use of the term "ass" was not indecent in context); *PTC 2*, 20 FCC Rcd 1938, ¶ 8 (finding that broadcast references to "hell," "damn," "bitch," and "pissed" were not indecent).

[264] *Id.* (finding that several words, including "pissed," were not profane in context).

10. "Family Guy" (January 16, 2005)[265]

200. ***The Programming.*** The Commission received a complaint concerning the January 16, 2005 broadcast of "Family Guy" over Fox Television Network-affiliated stations, and specifically Station WTTG-TV, Washington, D.C., at 9:00 p.m. Eastern Standard Time. The episode in question, titled "And The Weiner Is . . . . ," includes dialogue in which cartoon characters say "penis," along with euphemisms for the male sex organ, within the episode's subject: a father's concern that he is not as well-endowed as his son.

201. ***Indecency Analysis.*** The episode's references to "penis" clearly places it within the subject matter scope of our indecency definition as the word "penis" refers to a sexual organ.[266] We thus turn to the second prong of our indecency analysis—whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium. In making this determination, we must look to the full context in which the material is presented, including the explicit or graphic nature of the description, whether it dwells on or repeats at length descriptions of sexual organs or activities, and whether it appears to pander or is used to titillate or shock. While the program's cartoon format may make it more attractive to younger viewers, the context is generally a humorous series of scenes of increasingly desperate behavior by the cartoon family father as he tries to compensate for his self-perceived

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[265] FCC File No. EB-05-IH-0084.

[266] *Young Broadcasting NAL*, 19 FCC Rcd at 1754 ¶ 9 (finding that broadcast material that showed a male performer's genitalia satisfied the subject matter prong of the indecency analysis).

inadequacies after learning that his son's penis is larger than his own.

202. Regarding the first component of our contextual analysis, the program contains no nudity and never actually shows or graphically describes any sexual organ. The episode merely refers to the cartoon son's penis and shows the cartoon father's and mother's reactions upon learning of it. Moreover, the specific euphemisms that are employed, such as "wang" and "little banana," are relatively inoffensive. In a similar case, the Commission found that several episodes of the program "Coupling" were not sufficiently vulgar, explicit, or graphic to qualify as indecent, even though they repeatedly referred to sexual activities and organs.[267] The Commission concluded that although the episodes included "sustained and repeated use of sexual innuendo and double entendre . . . none of the episodes contain[ed] graphic descriptions of sexual activities and organs or use[d] language that is so graphic as to qualify as indecent and profane."[268]

203. Regarding the second component of our contextual analysis, the episode does dwell upon and repeat various references to penises. As we have noted previously, however, no single factor in our indecency analysis is generally dispositive.[269]

204. Finally, we do not find that the material is used to pander, titillate, or shock. Rather, the episode at issue addresses the father's feelings of inferiority, and the

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[267] *See Coupling MO&O*, 19 FCC Rcd at 23027 ¶ 7.

[268] *Id.*

[269] *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

topic is presented in an indirect, humorous manner, without the use of graphic or explicit details.

205. In sum, although the word "penis" and euphemisms for that word are repeated several times in the episode, we find that because of the absence of explicit or graphic descriptions or depictions of any sexual organ, along with the absence of shocking, pandering, and/or titillating effect, the episode, taken as a whole, is not patently offensive as measured by contemporary community standards for the broadcast medium and is therefore not indecent. Accordingly, the complaint is denied.

11. "The Academy Awards" (February 27, 2005)[270]

206. ***The Programming.*** The Commission received several complaints against the ABC Television Network's broadcast of "The Academy Awards" program, alleging that show host Chris Rock uttered vulgar and offensive comments including "sit their asses down," and the statement that the "Superman" film "sucked." One complainant further alleges that the program featured a video montage in which a male actor was "naked from the waist up, standing in the background, [while a female actor] was apparently eating a sausage or other item, but it appeared to be superimposed and gave the appearance of her performing oral sex on the man." The segments in question were all broadcast during the evening of February 27, 2005 before 10 p.m. Eastern Standard Time.

207. ***Indecency Analysis.*** With respect to the first prong of the indecency analysis, we find that the broad-

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[270] FCC File No. EB-05-IH-0277.

cast falls within the scope of the indecency definition.[271] We will assume *arguendo* that, in certain contexts, the term "sucked" may refer to oral sex. The phrase "sit their asses down" refers to the buttocks, which are sexual and excretory organs. Similarly, the video clip described in the complaint uses video images to allude to oral sex, a sexual activity, and thus is within the scope of our indecency definition. We therefore evaluate whether the foregoing material is "patently offensive" as measured by the contemporary community standards for the broadcast medium under the second step of our indecency analysis.

208. We find that although the complained-of phrases "sit their asses down" and "sucked" may be coarse expressions, in the context presented, they are not sufficiently vulgar, explicit, or graphic to support a patent offensiveness finding.[272] First, in the context presented, the word "sucked" is not an explicit or graphic description of sexual or excretory organs or activities. Its use does not invariably invoke a coarse sexual image. The phrase "sit their asses down" includes a coarse expression for the buttocks, but involves a command to sit down, rather than referring to sexual or excretory activity. In addition, while not dispositive, neither remark is repeated or dwelled upon. Furthermore, while this terminology may have been upsetting to some viewers, it is not sufficiently graphic, explicit, or sustained to support the conclusion that it was shocking, pandering or titil-

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[271] *See supra* ¶ 12.

[272] *See PTC 2*, 20 FCC Rcd at 1938 ¶ 8 (in context, words "dick," "hell," damn," "orgasm," "penis," "testicles," "breast," "nipples," "can," "pissed," "crap," "bastard," and "bitch" were not sufficiently explicit or graphic to be patently offensive).

lates the audience. Although use of such phrases may, depending on the context involved, contribute to a finding of indecency, their use here was not patently offensive and therefore not indecent.

209. Moreover, we find that the program's video montage, which allegedly "gave the appearance of" a depiction of oral sex, is not actionably indecent. In a recent case, the Commission denied substantially similar complaints directed against the broadcast of segments from the film "Austin Powers: The Spy Who Shagged Me."[273] Significantly, in this case, as in the "Austin Powers" film, the material cited in the complaint does not actually depict sexual organs or activities; it only uses superimposed images to allude to oral sex. Therefore, we find that the material does not explicitly or graphically depict sexual organs or activities. Furthermore, the image was extremely brief, lasting a mere fraction of a second. Finally, the visual allusion, in context, is not shocking or titillating, and in any event, is simply not explicit and graphic enough to be patently offensive as measured by contemporary community standards for the broadcast medium. Therefore, we find that it was not indecent. Accordingly, the complaints are denied.

12. "8 Simple Rules" (February 4, 2005)[274]

210. ***The Programming.*** The Commission received a complaint regarding the February 4, 2005 broadcast of the ABC Television Network program, "8 Simple Rules" between 6 a.m. and 10 p.m. Eastern Standard Time. According to the complaint, "[a]t the conclusion of the episode, I observed the mother and the oldest child as they

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[273] *See PTC I*, 20 FCC Rcd at 1926-27, ¶¶ 7-9.

[274] FCC File No. EB-05-IH-0465.

stood near a hamster cage in the home. The older girl looked into a hamster cage and asked ' . . . what is it doing?' . . . then the girl said ' . . . hamsterbating.' This was a reference [that] the hamster was 'masturbating.'" The complaint urges the Commission to issue a public warning or fine against ABC and "to take a position not to allow this type of behavior and language on television."

211. ***Indecency Analysis.*** As an initial matter, we will assume but not decide that the broadcast falls within the subject-matter prong of our analysis, as it references the sexual activity of masturbation. We conclude, however, that the program is not indecent because it is not patently offensive as measured by the contemporary community standards for the broadcast medium.

212. Turning to the three principal factors that inform our contextual analysis, while the use of the term "hamsterbating" would be interpreted by many viewers as constituting a veiled reference to the sexual activity of masturbation, the term is neither graphic nor explicit, and the program never depicts any sexual activity or organ. Moreover, although not dispositive, it is also relevant to our analysis that the allusion to masturbation is not in any way sustained or dwelled upon. Finally, we conclude that while the use of the term "hamsterbating" may have disturbed some viewers of this program, which is aimed in part at a younger audience, the term's shock value is marginal at best, and in this context is outweighed by the non-explicit and non-repeated nature of the allegedly indecent material. For all of these reasons, we deny the complaint.

13. "The Today Show" (January 11, 2005)[275]

213. ***The Programming.*** The Commission received a complaint about the January 11, 2005 broadcast of "The Today Show" between 6 a.m. and 10 p.m. Eastern Standard Time. That program contained a segment showing scenes of the devastating floods and mudslides that had occurred in California and of various rescue efforts. In one scene, viewers see an attempt to pull a man wearing only a shirt from raging water onto the safety of a highway overpass. As the man is hauled from water level to the boat, his penis is briefly exposed. At the end of the scene, the rescuers lose their grip on the man, and he goes crashing back into the water, narrowly missing a pillar of the overpass as he falls.

214. ***Indecency Analysis.*** In conducting our indecency analysis in this case, it is important to recognize and emphasize the context of the broadcast material. The complained-of segment contained contemporaneous coverage of an important news event. Therefore, we must exercise particular caution here as the complaint involves programming that implicates core First Amendment concerns. The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs and, therefore, is within the subject matter scope of the Commission's indecency definition. The broadcast clearly falls within the subject matter scope of our indecency definition because the scene includes a view of a man's penis, which is a sexual organ.[276] We thus turn to the second prong of

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[275] FCC File No. EB-05-IH-0365.

[276] *See Young Broadcasting NAL*, 19 FCC Rcd at 1754 (finding that a broadcast of performer's exposed penis satisfies subject matter prong of indecency analysis).

our indecency analysis—a determination of whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium.

215. Regarding the first principal component of our contextual analysis, although the Commission previously has found exposure of adult sexual organs to be graphic and explicit in certain situations,[277] in this particular context, we find that the complained-of material is not graphic or explicit. The shot of the man's penis is not at close range, and the overall focus of the scene is on the rescue attempt, not on the man's sexual organ. Here, the distant image of a man's penis in footage displaying efforts to rescue him from mortal peril is not explicit or graphic.

216. With respect to the second principal component of our contextual analysis, the segment does not dwell on or repeat the image of the victim's penis. To the contrary, the segment can be fairly described as providing only a brief glimpse of the penis that is incidental to the overall action portrayed—a human rescue effort.

217. Turning to the final principal component of our analysis, and the most important in this particular context, we find that the material does not pander to, titillate, or shock the viewing audience. Rather, it contains coverage of a significant news event and shows the human experience behind that event. To the extent there is shock value to the footage, it derives from the overall action portrayed—the effort to rescue a human life—not from the footage's minimal sexual content.

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[277] *Id.* *See also Super Bowl NAL*, 19 FCC Rcd at 19235 (finding that a broadcast of performer's breast was graphic and explicit).

218. Since the material taken as a whole is not graphic or explicit, does not dwell on or repeat images of a sexual organ or activity, and does not appear to shock, pander, and/or titillate, it does not satisfy the second prong of our indecency analysis and, therefore, we deny the complaint. In doing so, we again recognize the need for particular caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee.[278] We also emphasize the critical importance of context in determining whether a broadcast is patently offensive. In this regard, the contrast between this case and the *Young Broadcasting NAL* is instructive. Each involves the brief, accidental exposure of male frontal nudity during a news program. Unlike in this case, however, the performer's penis in the *Young Broadcasting NAL* was exposed at relatively close range.[279] More importantly, the display was not incidental to the coverage of a news event; rather, it occurred during an interview of performers who appear nude to manipulate their genitalia, and as the performer stood up to give an off-camera demonstration to the show's hosts.[280] Here, in contrast, the program's focus

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[278] *See Syracuse Peace Council*, 2 FCC Rcd at 5050-51 ¶ 52 (eliminating the fairness doctrine, which placed an affirmative obligation on broadcasters to cover, and present contrasting viewpoints on, controversial issues of public importance).

[279] 19 FCC Rcd at 1752.

[280] *Id.* at 1756-57. Noting the comments of off-camera employees urging the performers to conduct a nude demonstration, and the partially off-camera demonstration to the show's hosts, the Commission found that the display was pandering, titillating and shocking, notwithstanding the licensee's precautions to prevent such a display. *Id.* at

is a rescue effort, and the complained-of material is incidental and easily could evade the notice of a viewer focused on this effort.

14. "The Simpsons" (September 9, 2004)[281]

219. ***The Programming.*** The Commission received a complaint regarding the broadcast of an episode of "The Simpsons" over Station WTTG(TV), Washington, D.C., at 6:30 p.m. Eastern Daylight Time on September 9, 2004.[282] The complaint states that the program contains a graphic and explicit depiction of a scene in a strip club. The Bureau requested and received a videotape of the program in question from Fox Television Stations, Inc., the licensee of the station.

220. The "Simpsons" is an animated comedy series featuring a number of regular characters, including the elderly Mr. Burns and his assistant Smithers. The complained-of episode, entitled "Hunka Hunka Burns In Love," deals with Mr. Burns's romantic ineptitude. The scene in question shows Mr. Burns leading Smithers into a club with a "Girls Girls Girls" sign and saying, "Maybe there are some girls in here." In the club, female cartoon characters dance around poles clothed in two-piece or one-piece lingerie or underwear. Mr. Burns reacts by saying, "Great Heavens! This is one of those nude female fire stations! Oh, I'd always be second place to some kitten stuck in a tree. Let's go, Smithers." Smithers is momentarily depicted as crouching and whimpering in embarrassment as he is cornered by two dancers. Although the complaint states that the scene depicts

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1757.

[281] FCC File No. EB-05-IH-0041.

[282] *See* Complaint dated September 8, 2004.

physical contact between Smithers and a female cartoon dancer's buttocks, we were unable to confirm this statement based on our viewing of the tape.

221. ***Indecency Analysis.*** As an initial matter, for purposes of this analysis, we assume without deciding that the depiction of female cartoon characters dancing in lingerie falls within the subject-matter prong of our indecency standard. We conclude, however, that the program is not indecent because it is not patently offensive as measured by the contemporary community standards for the broadcast medium.

222. Regarding the first principal component of our contextual analysis, we conclude that the complained-of material does not graphically or explicitly depict sexual organs or activities. Although the movements of the two female dancers shown with Smithers are somewhat sexually suggestive, and one of the dancers is shown from behind wearing a "thong," the scene is not graphic. No cartoon character is shown completely nude, and there are no clear depictions of physical contact involving the cartoon characters's sexual organs in the scene. Moreover, although a cartoon might be patently offensive if it contained sufficiently graphic or explicit depictions of sexual or excretory organs or activities, in this context the animation weighs against a finding of patent offensiveness: the characters are linear representations, and to the extent they are depicted in sexually-suggestive clothing or situations, the animation makes those depictions inherently less graphic and explicit than, for example, those involved in the "Video Musicales" program discussed above in Section III.A.4.

223. With respect to the second principal component of our contextual analysis, the scene is relatively brief

and does not dwell on depictions of sexual organs or activities.[283] Turning to the final principal component of our analysis, we do not find that the material is panders to, titillates, or shocks the viewing audience within the context of the program at issue. Rather, the scene is a relatively brief vignette about the male characters' romantic ineptitude. Since the material taken as a whole is not graphic, explicit, or sustained and does not appear to shock, pander, and/or titillate, we find that it is not patently offensive. Accordingly, we deny the complaint.

15. "America's Funniest Home Videos" (February 5, 2005)[284]

224. ***Programming.*** The Commission received a complaint regarding the February 5, 2005 episode of the ABC Television Network program "America's Funniest Videos" ("AFV") that was broadcast over Station WHAM (TV), Rochester, New York. The complaint alleged that this episode, which aired from 8:00 to 8:30 p.m. Eastern Standard Time, included a clip in which a "butt plug" was allegedly inserted into a naked, male infant. As part of the investigation in this matter, the Enforcement Bureau requested and received from the licensee a videotape of that AFV episode. This videotape reveals that the episode depicted a naked infant falling back onto his pacifier, which then becomes wedged between his buttocks.

225. ***Indecency Analysis.*** The first prong of our indecency analysis is whether the program depicts or de-

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[283] *Compare Married By America*, 19 FCC Rcd at 20195, ¶ 12 (finding material to be sustained where scene at issue lasted approximately 6 minutes).

[284] FCC File No. EB-05-IH-0212.

scribes sexual or excretory activities or organs, and, therefore, is within the subject matter scope of the Commission's indecency definition. Because this videotape depicts a child's nude buttocks, we find that it depicts both excretory and sexual organs,[285] and the broadcast therefore falls within the subject matter scope of our indecency analysis. We must then turn to the next part of our analysis—whether the broadcast was "patently offensive" as measured by contemporary community standards for the broadcast medium.

226. Turning to the first principal factor in our contextual analysis of whether material is patently offensive, the segment at issue shows a naked infant falling back onto his pacifier, which then becomes wedged between his buttocks and is therefore marginally explicit. With regard to the second factor, while not dispositive, the broadcast does not dwell on or repeat at length any description or depiction of sexual or excretory organs or activities.[286] Rather, the program shows the relevant segment once and then moves on to other videotapes. And finally, the footage does not appear to shock, pander, or titillate. The depiction, submitted by the infant's parents, is not sexualized in any manner whatsoever. In conclusion, based on our review of the full context of the broadcast, we find that the broadcast is not indecent. Although, as indicated above, the footage is somewhat explicit, its brevity and the absence of any shocking, pandering, or titillate effect on the audience outweigh

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[285] *See supra* note 97.

[286] *See PTC 2*, 20 FCC Rcd at 1938 ¶ 9 (finding that a rudimentary depiction of a cartoon boy's buttocks was fleeting, and, in context, was not sufficiently graphic or explicit, or sustained, to rise to the level of being patently offensive).

that factor in our analysis. As we held in the *Indecency Policy Statement*, "no single factor generally provides the basis for an indecency finding."[287] Accordingly, the complaint is denied.

16. "Green Bay Packers v. Minnesota Vikings" (January 9, 2005)[288]

227. ***The Programming.*** The Commission received complaints regarding a broadcast over the Fox Television Network ("Fox" or "Fox Network") on the evening of January 9, 2005 prior to 10 p.m. Eastern Standard Time. The complaints allege that during the broadcast of the National Football League playoff game between the Green Bay Packers and the Minnesota Vikings, Fox broadcast the image of a player for the visiting Vikings team who, after scoring a touchdown, acted as if he were lowering his pants and exposing his buttocks to the crowd at Green Bay's Lambeau Field, although he remained fully clothed at all times. In other words, the player pretended to "moon" the crowd. The complaints seek an indecency finding and proposed monetary forfeitures against all Fox Network affiliate stations.

228. ***Indecency Analysis.*** Assuming without deciding that the broadcast of a mimed "mooning" depicts a sexual or excretory organ and thus falls within the subject matter prong of our indecency analysis, we nevertheless conclude that the material is not patently offensive as measured by contemporary community standards for the broadcast medium and thus is not indecent.

229. Each of the three principal factors that inform our contextual analysis weighs against a finding of pat-

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[287] *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

[288] FCC File No. EB-05-IH-0032.

ent offensiveness. First, the display involves only mimed actions by a fully-clothed player and thus is not graphic or explicit. Second, although not dispositive, it is also relevant that the images are not dwelled upon; the images appear for only a few seconds, and are not replayed during the broadcast. Finally, while we can understand why many viewers may have perceived the player's touchdown celebration as plainly inappropriate, we do not believe that his fully clothed display titillates or rises to the level of shocking behavior. Accordingly, we deny the complaints.

17. "Medium" (January 17, 2005)[289]

230. ***The Programming.*** The Commission received a complaint concerning the NBC Television Network ("NBC") broadcast of the program "Medium," at 9:00 p.m. Central Standard Time on January 17, 2005. The Enforcement Bureau requested and received a videotape of the program from NBC. A review of the tape discloses that the episode begins with a husband and wife being counseled by a therapist in an office setting. During the course of conversation with the couple, the therapist asks the husband to act out his selfish feelings by doing something with (or to) his wife, even if society might not approve of the act, and tells him that he should not be embarrassed because the therapist "has seen it all." In response, the husband stands up and faces this wife. He then pulls out a gun from his waist, and shoots his wife in the face.[290] The complainant ob

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[289] FCC File No. EB-05-IH-0463.

[290] The complaint states that the husband "unzips his pants" before shooting his wife, but our review of the videotape shows that the husband appears to simply remove a handgun from the area of his waist.

jects to this portrayal of sex associated with violence against women broadcast at that hour of the evening.

231. ***Indecency Analysis.*** As discussed above, our definition of indecent programming is limited to material that describes or depicts sexual or excretory organs or activities.[291] Violence *per se* is not currently within the defined subject matter scope of these limitations on broadcast programming. The complained-of portion of the episode arguably contains dialogue that suggests the possibility that the husband might wish to engage in some kind of sexual activity with his wife. However, no such activity is described or takes place, and thus the material is not within the scope of our indecency definition. Accordingly, we must deny the complaint.

232. We wish to emphasize, however, that we understand the concerns of the complainant and others with the issue of violent programming on television, as well as the bizarre and shocking violence that is portrayed in the complained-of episode. Last year, at Congress's urging, we initiated a proceeding to examine violent television programming and its impact on children.[292] In doing so, we sought information about the nature and amount of violent television programming, its effects,

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No unzipping of pants is shown or heard during the scene.

[291] *See Indecency Policy Statement*, 16 FCC Rcd at 8000 ¶ 4 (noting that "in addition, the [*Pacifica*] Court quoted the Commission's definition of indecency with apparent approval. The definition, "language or material that, in context depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs," has remained substantially unchanged since the time of the *Pacifica* decision") (internal citations omitted).

[292] *See Violent Television Programming and Its Impact on Children*, Notice of Inquiry, 19 FCC Rcd 14394 (2004).

what measures are available to control exposure to media violence, and the need for and the legal basis of our ability, if any, to regulate in this area. We have invited the public to submit comments for our consideration, and are currently reviewing those comments and determining our next steps.

IV. ORDERING CLAUSES

233. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that NBC Telemundo License Co., licensee of Station KWHY-TV, Los Angeles, California is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $32,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its October 9, 2004, broadcast of the movie "Con El Corazon En La Mano."[293]

234. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to F. William LeBeau, Senior Regulatory Counsel & Assistant Secretary, NBC Universal, Inc., 1299 Pennsylvania Avenue, N.W., 11th Floor, Washington, D.C. 20004.

235. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that Sherjan Broadcasting Company, Inc., licensee of Station WJAN-CA, Miami, Florida, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEI-

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[293] NAL Account Number 200632080007, FRN No. 0014139422, Facility ID No. 26231.

TURE in the amount of $32,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its October 19, 2004, broadcast of the "Fernando Hidalgo Show."[294]

236. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to Peter Tannenwald, counsel for Sherjan Broadcasting Company, Inc., Irwin Campbell & Tannenwald, PC, 1730 Rhode Island Avenue, N.W., Suite 200, Washington, D.C. 20036-3101.

237. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that Aerco Broadcasting Corp., licensee of Station WSJU-TV, San Juan, Puerto Rico, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $220,000 for willfully and repeatedly violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its broadcast of various music videos, described above in the *NAL and MO&O*, during the "Video Musicales" program from January through March 2002.[295]

238. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to John A. Borsari, counsel for Aerco Broadcasting Corp., John A. Borsari & Associates, PLLC, 2111 Wilson Blvd., P.O. Box 100009, Suite 700, Arlington, Virginia 22210; and David Ramos,

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[294] NAL Account Number 200632080008, FRN No. 0003756897, Facility ID No. 60165.

[295] NAL Account Number 200632080010, FRN No. 0003732435, Facility ID No. 4077.

D'Vanguardia, 497 Ave. E. Pol. Apartado 187, San Juan, Puerto Rico 00926-5636.

239. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that WBDC Broadcasting, Inc., licensee of Station WBDC-TV, Washington, D.C., is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $27,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its February 8, 2004 broadcast of "The Surreal Life 2."[296]

240. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to Arthur H. Harding, Fleischman and Walsh, LLP, counsel for the WB Television Network, 1919 Pennsylvania Avenue, N.W., Suite 600, Washington, D.C. 20006; R. Clark Wadlow and Thomas P. Van Wazer, Sidley Austin Brown & Wood LLP, counsel for WBDC Broadcasting, Inc., 1501 K Street, N.W., 10th Floor, Washington, D.C. 20005; and Dan Issett, Director of Corporate and Government Affairs, Parents Television Council, 325 S. Patrick Street, Alexandria, Virginia 22314.

241. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that San Mateo County Community College District, licensee of noncommercial educational Station KCSM-TV, San Mateo, California, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of

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[296] NAL Account Number 200632080011, FRN No. 0002833267, Facility ID No. 30576.

$15,000 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its broadcast of "The Blues: Godfathers and Sons" on March 11, 2004.[297]

242. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to Marilyn R. Lawrence, General Manager, Station KCSM-TV, San Mateo County Community College District, 1700 West Hillsdale Blvd, San Mateo, California 94402.

243. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that KTVI License, Inc., licensee of Station KTVI(TV), St. Louis, Missouri, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $27,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its broadcast of "The Pursuit of D.B. Cooper" on March 15, 2003.[298]

244. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to John C. Quale, Counsel for KTVI License, Inc., Skadden Arps Meagher & Flom, LLP, 1440 New York Avenue, N.W., Washington, D.C. 20005-2111.

245. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty

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[297] NAL Account Number 200632080012, FRN No. 0001545185, Facility ID No. 58912.

[298] NAL Account Number 200632080089, FRN No. 0003476009, Facility ID No. 35693.

(30) days of the release of these *NALs*, each licensee identified above SHALL PAY the full amount of its proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of their proposed forfeiture.

246. Payment of each forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. Payments must include the relevant NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

247. The responses, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearing Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554, and MUST INCLUDE the relevant NAL/Acct. No. referenced for each proposed forfeiture above.

248. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the

basis for the claim by reference to the financial documentation submitted.

249. Requests for payment of the full amount of these *NALs* under an installment plan should be sent to: Associate Managing Director—Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[299]

250. Accordingly, IT IS ORDERED that the complaints in the above-referenced *NAL* proceedings ARE GRANTED to the extent indicated herein, AND ARE OTHERWISE DENIED, and the complaint proceedings ARE HEREBY TERMINATED.

251. IT IS FURTHER ORDERED that the complaints referenced in these *NALs and MO&O* are GRANTED to extent set forth herein and otherwise DENIED.[300]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

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[299] *See* 47 C.F.R. § 1.1914.

[300] Consistent with section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by each *NAL* in this *Order*, the only party or parties to such proceeding will be the licensee or licensees specified above.

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show; Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace"

Congress has long prohibited the broadcasting of indecent and profane material and the courts have upheld challenges to these standards. But the number of complaints received by the Commission has risen year after year. They have grown from hundreds, to hundreds of thousands. And the number of programs that trigger these complaints continues to increase as well. I share the concerns of the public - and of parents, in particular- that are voiced in these complaints.

I believe the Commission has a legal responsibility to respond to them and resolve them in a consistent and effective manner. So I am pleased that with the decisions released today the Commission is resolving hundreds of thousands of complaints against various broadcast licensees related to their televising of 49 different programs. These decisions, taken both individually and as a whole, demonstrate the Commission's continued commitment to enforcing the law prohibiting the airing of obscene, indecent and profane material.

Additionally, the Commission today affirms its initial finding that the broadcast of the Super Bowl XXXVIII Halftime Show was actionably indecent. We appropriately reject the argument that CBS continues to make that this material is not indecent. That argument runs counter to Commission precedent and common sense.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Complaints Regarding Various Television Broadcasts Between January 1, 2002 and March 12, 2005

Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace," Notice of Apparent Liability for Forfeiture

Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order

In the past, the Commission too often addressed indecency complaints with little discussion or analysis, relying instead on generalized pronouncements. Such an approach served neither aggrieved citizens nor the broadcast industry. Today, the Commission not only moves forward to address a number of pending complaints, but does so in a manner that better analyzes each broadcast and explains how the Commission determines whether a particular broadcast is indecent. Although it may never be possible to provide 100 percent certain guidance because we must always take into account specific and often-differing contexts, the approach in today's orders can help to develop such guidance and to establish precedents. This measured process, common in jurisprudence, may not satisfy those who clamor for immediate certainty in an uncertain world, but it may just be the best way to develop workable rules of the road.

Today's Orders highlight two additional issues with which the Commission must come to terms. First, it is time for the Commission to look at indecency in the broader context of its decisions on media consolidation. In 2003 the FCC sought to weaken its remaining media concentration safeguards without even considering whether there is a link between increasing media consolidation and increasing indecency. Such links have been shown in studies and testified to by a variety of expert witnesses. The record clearly demonstrates that an overwhelming number of the Commission's indecency citations have gone to a few huge media conglomerates. One recent study showed that the four largest radio station groups which controlled just under half the radio audience were responsible for a whopping 96 percent of the indecency fines levied by the FCC from 2000 to 2003.

One of the reasons for the huge volume of complaints about excessive sex and graphic violence in the programming we are fed may be that people feel increasingly divorced from their "local" media. They believe the media no longer respond to their local communities. As media conglomerates grow ever larger and station control moves farther away from the local community, community standards seem to count for less when programming decisions are made. Years ago we had independent programming created from a diversity of sources. Networks would then decide which programming to distribute. Then local affiliates would independently decide whether to air that programming. This provided some real checks and balances. Nowadays so many of these decisions are made by vertically-integrated conglomerates headquartered far away from the communities they are supposed to be serving—entities

that all too often control both the distribution *and* the production content of the programming.

If heightened media consolidation is indeed a source for the violence and indecency that upset so many parents, shouldn't the Commission be cranking that into its decisions on further loosening of the ownership rules? I hope the Commission, before voting again on loosening its media concentration protections, will finally take a serious look at this link and amass a credible body of evidence and not act again without the facts, as it did in 2003.

Second, a number of these complaints concern graphic broadcast violence. The Commission states that it has taken comment on this issue in another docket. It is time for us to step up to the plate and tackle the issue of violence in the media. The U.S. Surgeon General, the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, and countless other medical and scientific organizations that have studied this issue have reached the same conclusion: exposure to graphic and excessive media violence has harmful effects on the physical and mental health of our children. We need to complete this proceeding.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING IN PART, DISSENTING IN PART

Re: Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order

I have sworn an oath to uphold the Constitution[1] and to carry out the laws adopted by Congress.[2] Trying to find a balance between these obligations has been challenging in many of the indecency cases that I have decided. I believe it is our duty to regulate the broadcast of indecent material to the fullest extent permissible by the Constitution because safeguarding the well-being of our children is a compelling national interest.[3] I therefore have supported efforts to step up our enforcement of indecency laws since I joined the Commission.

The Commission's authority to regulate indecency over the public airwaves was narrowly upheld by the Supreme Court with the admonition that we should exercise that authority with the utmost restraint, lest we inhibit constitutional rights and transgress constitutional limitations on government regulation of protected speech.[4] Given the Court's guidance in *Pacifica*, the

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[1] U.S. CONST., amend. I.

[2] Congress has specifically forbidden the broadcast of obscene, indecent or profane language. 18 U.S.C. § 1464. It has also forbidden censorship. 47 U.S.C. § 326.

[3] *See, e.g., N.Y. v. Ferber*, 458 U.S. 747, 756-57 (1982).

[4] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (emphasizing the "narrowness" of the Court's holding); *Action for Children's*

Commission has repeatedly stated that we would judiciously walk a "tightrope" in exercising our regulatory authority.[5] Hence, within this legal context, a rational and principled "restrained enforcement policy" is not a matter of mere regulatory convenience. It is a constitutional requirement.[6]

Accordingly, I concur in part and dissent in part with today's decision because, while in some ways the decision does not go far enough, in other ways it goes too far. Significantly, it abruptly departs from our precedents by adopting a new, weaker enforcement mechanism that arbitrarily fails to assess fines against broadcasters who have aired indecent material. Additionally, while today's decision appropriately identifies violations of our indecency laws, not every instance determined to be indecent meets that standard.

We have previously sought to identify all broadcasters who have aired indecent material and hold them accountable. In this Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was the subject of a viewer's com-

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Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*") ("Broadcast material that is indecent but not obscene is protected by the [F]irst [A]mendment.").

[5] *See* Brief for Petitioner, FCC, 1978 WL 206838 at *9.

[6] *ACT I*, *supra* note 4, at 1344 ("[T]he FCC may regulate [indecent] material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear."); *Id.* at 1340 n.14 ("[T]he potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy."). *See also Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, FCC 06-17 at note 11 (rel. March 15, 2006).

plaint, even though we know millions of other Americans were exposed to the offending broadcast. I cannot find anywhere in the law that Congress told us to apply indecency regulations only to those stations against which a complaint was specifically lodged. The law requires us to prohibit the broadcast of indecent material, period. This means that we must enforce the law anywhere we determine it has been violated. It is willful blindness to decide, with respect to network broadcasts we know aired nationwide, that we will only enforce the law against the local station that happens to be the target of viewer complaints. How can we impose a fine solely on certain local broadcasters, despite having repeatedly said that the Commission applies a national indecency standard—not a local one?[7]

The failure to enforce the rules against some stations but not others is not what the courts had in mind when they counseled restraint. In fact, the Supreme Court's decision in *Pacifica* was based on the uniquely pervasive characteristics of broadcast media.[8] It is patently arbitrary to hold some stations but not others accountable for the same broadcast. We recognized this just two years ago in *Married By America*.[9] The Commission

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[7] *See, e.g., In re Sagittarius Broadcasting Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6873, 6876 (1992) (subsequent history omitted).

[8] *See Pacifica Found.*, 438 U.S. at 748-49 (recognizing the "uniquely pervasive presence" of broadcast media "in the lives of all Americans"). In today's Order, paragraph 10, the Commission relies upon the same rationale.

[9] *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20196 (2004) (proposing a $7,000 forfeiture against

simply inquired who aired the indecent broadcast and fined all of those stations that did so.

In the *Super Bowl XXXVIII Halftime Show* decision, we held only those stations owned and operated by the CBS network responsible, under the theory that the affiliates did not expect the incident and it was primarily the network's fault.[10] I dissented in part to that case because I believed we needed to apply the same sanction to every station that aired the offending material. I raise similar concerns today, in the context of the instant Order.

The Commission is constitutionally obligated to decide broadcast indecency and profanity cases based on the "contemporary community standard," which is "that of the average broadcast viewer or listener." The Commission has explained the "contemporary community standard," as follows:

> We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and

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each Fox Station and Fox Affiliate station); *reconsideration pending. See also Clear Channel Broad. Licenses, Inc.*, 19 FCC Rcd 6773, 6779 (2004) (proposing a $495,000 fine based on a "per utterance" calculation, and directing an investigation into stations owned by other licensees that broadcast the indecent program). In the instant Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was actually the subject of a viewer's complaint to the Commission. *Id.* at ¶ 71.

[10] *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability, 19 FCC Rcd 19230 (2004).

> ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.[11]

I am concerned that today's Order overreaches with its expansion of the scope of indecency and profanity law, without first doing what is necessary to determine the appropriate contemporary community standard.

The Order builds on one of the most difficult cases we have ever decided, *Golden Globe Awards*,[12] and stretches it beyond the limits of our precedents and constitutional authority. The precedent set in that case has been contested by numerous broadcasters, constitutional scholars and public interest groups who have asked us to revisit and clarify our reasoning and decision. Rather than reexamining that case, the majority uses the decision as a springboard to add new words to the pantheon of those deemed to be inherently sexual or excretory, and consequently indecent and profane, irrespective of their common meaning or of a fleeting and isolated use. By failing to address the many serious concerns raised in the reconsideration petitions filed in the *Golden Globe Awards* case, before prohibiting the use of additional words, the Commission falls short of meeting the constitutional standard and walking the tightrope of a restrained enforcement policy.

This approach endangers the very authority we so delicately retain to enforce broadcast decency rules. If

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[11] *In re Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).

[12] *In re Complaints Against Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004); *petitions for stay and reconsideration pending.*

the Commission in its zeal oversteps and finds our authority circumscribed by the courts, we may forever lose the ability to protect children from the airing of indecent material, barring an unlikely constitutional amendment setting limitations on the First Amendment freedoms.

The perilous course taken today is evident in the approach to the acclaimed Martin Scorsese documentary, "The Blues: Godfathers and Sons." It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary. This contextual reasoning is consistent with our decisions in *Saving Private Ryan*[13] and *Schindler's List*.[14]

The Commission has repeatedly reaffirmed, and the courts have consistently underscored, the importance of content *and* context. The majority's decision today dangerously departs from those precedents. It is certain to strike fear in the hearts of news and documentary mak-

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[13] *In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film, "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4513 (2005) ("Deleting all [indecent] language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers"); *See also Peter Branton*, Letter by Direction of the Commission, 6 FCC Rcd 610 (1991) (concluding that repeated use of the f-word in a recorded news interview program not indecent in context).

[14] *In the Matter of WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838 (2000).

ers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech.

We should be mindful of Justice Harlan's observation in *Cohen v. California*.[15] Writing for the Court, he observed:

> [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[16]

Given all of these considerations, I find that today's decision, while reaching some appropriate conclusions both in identifying indecent material and in dismissing complaints, is in some ways dangerously off the mark. I cannot agree that it offers a coherent, principled long-term framework that is rooted in common sense. In fact, it may put at risk the very authority to protect children that it exercises so vigorously.

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[15] 403 U.S. 15 (1971).

[16] *Id.* at 26 ("We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").

STATEMENT OF COMMISSIONER DEBORAH TAYLOR TATE

Re: *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order; *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace,"* Notice of Apparent Liability; *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order

Today marks my first opportunity as a member of the Federal Communications Commission to uphold our responsibility to enforce the federal statute prohibiting the airing of obscene, indecent or profane language.[1] To be clear—I take this responsibility very seriously. Not only is this the law, but it also is the right thing to do.

One of the bedrock principles of the Communications Act of 1934, as amended, is that the airwaves belong to the public. Much like public spaces and national landmarks, these are scarce and finite resources that must be preserved for the benefit of all Americans. If numbers are any indication, many Americans are not happy about the way that their airwaves are being utilized. The number of complaints filed with the FCC reached over one million in 2004. Indeed, since taking office in January 2006, I have received hundreds of personal e-mails from people all over this country who are unhappy

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[1] *See* 18 U.S.C. § 1464.

with the content to which they—and, in particular, their families—are subjected.

I have applauded those cable and DBS providers for the tools they have provided to help parents and other concerned citizens filter out objectionable content. Parental controls incorporated into cable and DBS set-top boxes, along with the V-Chip, make it possible to block programming based upon its content rating. However, these tools, even when used properly, are not a complete solution. One of the main reasons for that is because much of the content broadcast, including live sporting events and commercials, are not rated under the two systems currently in use.

I also believe that consumers have an important role to play as well. Caregivers—parents, in particular—need to take an active role in monitoring the content to which children are exposed. Even the most diligent parent, however, cannot be expected to protect their children from indecent material broadcast during live sporting events or in commercials that appear during what is marketed to be "appropriate" programming.

Today, we are making significant strides toward addressing the backlog of indecency complaints before this agency. The rules are simple—you break them and we will enforce the law, just as we are doing today. Both the public and the broadcasters deserve prompt and timely resolution of complaints as they are filed, and I am glad to see us act to resolve these complaints. At the same time, however, I would like to raise a few concerns regarding the complaints we address in these decisions.

First, I would like to discuss the complaint regarding the 6:30 p.m. Eastern Daylight Time airing of an episode of *The Simpsons*. The *Order* concludes that this seg-

ment is not indecent, in part because of the fact that *The Simpsons* is a cartoon. Generally speaking, cartoons appeal to children, though some may cater to both children and adults simultaneously. Nevertheless, the fact remains that children were extremely likely to have been in the viewing audience when this scene was broadcast. Indeed, the marketing is aimed at children. If the scene had involved real actors in living color, at 5:30 p.m. Central Standard Time, I wonder if our decision would have been different? One might argue that the cartoon medium may be a more insidious means of exposing young people to such content. By their very nature, cartoons do not accurately portray reality, and in this instance the use of animation may well serve to present that material in a more flattering light than it would if it were depicted through live video. I stop short of disagreeing with our decision in this case, but note that the animated nature of the broadcast, in my opinion, may be cause for taking an even closer look in the context of our indecency analysis.

Second, our conclusion regarding the 9:00 p.m. Central Standard Time airing of an episode of *Medium* in which a woman is shot at point-blank range in the face by her husband gives me pause. While I agree with the result in this case, I question our conclusion that the sequence constitutes violence *per se* and therefore falls outside the scope of the Commission's definition of indecency. Without question, this scene is violent, graphically so. Moreover, it is presented in a way that appears clearly designed to maximize its shock value. And therein lies my concern. One of the primary ways that this scene shocks is that it leads the viewer to believe that the action is headed in one direction—through dialogue and actions which suggest that interaction of a sexual

nature is about to occur—and then abruptly erupts in another—the brutally violent shooting of a wife by her husband, in the head, at point-blank range. Even though the Commission's authority under Section 1464 is limited to indecent, obscene, and profane content, and thus does not extend to violent matter, the use of violence as the "punch line" of titillating sexual innuendo should not insulate broadcast licensees from our authority. To the contrary, the use of sexual innuendo may, depending on the specific case, subject a licensee to potential forfeiture, regardless of the overall violent nature of the sequence in which such sexual innuendo is used.

* * *

Finally, I would like to express my hope and belief that the problem of indecent material is one that can be solved. Programmers, artists, writers, broadcasters, networks, advertisers, parents, public interest groups, and, yes, even Commissioners can protect two of our country's most valuable resources: the public airwaves and our children's minds. We must take a stand against programming that robs our children of their innocence and constitutes an unwarranted intrusion into our homes. By working together, we should promote the creation of programming that is not just entertaining, but also positive, educational, healthful, and, perhaps, even inspiring.

Problem ID: 10

Date: 12/11/2003

From: Robert Fench

Subject: BILLBOARD AWARDS ON FOX

I WAS SITTING HERE IN ,Y LIVING ROOM WITH MY KIDS AND I AM RECORDING THIS TO SPEAK TO AN ATTORNEY AND PARIS HILTON AND HER FRIEND WERE UP GIVING THE AWARD AND SHE SAID FUCKING ON NATIONAL TV MY SON ASKED ME MOMMY WHAT IS FUCKING? THANKS ALOT FOR LETTING A VULGAR WORD GET PLAYED ON NATIONAL TV AND FOR TEACHING MY CHILD THIS THANKS A WHOLE LOT I WOULD WATCH THE TAPE IF I WERE YOU THIS HAPPENED A FEW MINUTES AFTRE 8PM CENTRAL TIME.

Problem ID: 15

Date: 12/11/2003

From: Rico Blanco

Subject: Fu## on TV

I must tell you that again, you let our country down with the airing of the f### word on national television. I want you to know that my 5 and 8 year old sons were watching the Billboard Music Awards when the F### word aired on our TV. Please tell me know what the FCC plans to do to insure this never happens again! Please remember we pay the taxes that make up your big paycheck!! Please get off you butt and do the work we pay you to do!!! Thanks for your time. Ricardo

Problem ID: 29

Date: 12/11/2003

From: Mcgregor, Karen

Subject: BILLBOARD AWARDS AIRED ON FOX 12-10-03

Dear Mr. Powell, I am wanting to let you that as I sat with my 13 year old daughter last night and watched the Billboard Awards, I was not happy to hear Nicole Richey say the F word after she was told to be careful what she said. There is absolutely NO reason for words of that nature to be spoken especially during primetime. I live in Central Texas and we are on central time, so the showed aired from 7pm to 9pm. Even Ryan Secrest made the comment that we are live! I am tolerant of a lot of things shown and said on TV, but the F word is not necessary in any context! My child, along with other children, hear and see enough at school, on TV and in general life as it is. I realize that channels can be changed, but who knew we were going to hear such vulgar words? In 2 separate parts of Pink's performance, the TV blanked out. I am assuming that it was something that wasn't politically correct to see, then why was Nicole's mouth not bleeped out? I feel that this was planned all along. I did not see Bono's acceptance from the Golden Globes but heard that he used the F word as a descriptive one. While I'm guessing his was just the way he talks, Nicole's was deliberate. People wonder what has happened to our society, to our children and why life is like it is. I am not blaming the media for all

that goes on, but we all know how impressionable our children can be and if they do not have responsible adults to take care of them, they hear and see from the media and take it to heart and think that it is all ok. I appreciate your time and attention to this matter and if you are a parent, grandparent or neither, that you understand how important it is that we take a stand on issues like this to try to protect our children for as long as we can. I look forward to your response. Thank you, Karen L. McGregor Cater Elementary Secretary [REDACTED].

Problem ID: 2016

Date: 12/12/2003

From: Colleen Collins-Reyes

Subject: FOX TV

Colleen Collins-Reyes [REDACTED] December 12, 2003 Dear Chairman Powell: My son and I were watching the 2003 Billboard Music Awards the other night, and I cant say that I have ever been so disappointed in you guys, Why would you allow such a thing? Don't you guys have grand kids that you would like to not see running around the house swearing at you? You guys allowed some trashy talk and swearing on there. When my son asked me what f**king meant I vowed to never watch FOX again. I don't know where you guys are coming from on this issue but something has to be done. I truly feel that the FCC has the responsibility of enforcing what constitutes decency on our nation's airways. Why have they failed the American people in this responsibility? To whom is the FCC accountable? I hope you plan on atlease considering changing this law. It is unappropriate and a disapointment to the American people. As if our kids haven't started becoming unruly enough. Has it dawned on anyone that 30 years ago when we had movies and TV kids could watch that we had no shootings in school, teenagers weren't acting like disrespectful punts etc. Oh or do you have the ignorant attitude that this has nothing to do twith it? Well let me shed some light, KIDS ONLY KNOW WHAT THEY LEARN. Stop teaching our kids it is ok to be rude and disrespectful. i would

hope that you plan on looking into this matter and let me know about your findings. Sincerely, Colleen Collins

Problem ID: 8537

Date: 12/15/2003

From: Anna Holmes

Subject: new regulations

Dear Chairman, Recently, my children, who are 6 and 9, we scanning the channels looking for a TV program to watch. We stopped at the Billboard Music Awards. We were not on the channel for 5 minutes when one of the musicians said the word "Fucking". I was shocked and disgusted. I am also disgusted by the ruling that using this or similar language is ok. It is hard enough to teach your children manners and decent behavior without showing young adults on the TV using it. I hope you will reverse your ruling immediately. It is sad that anyone would say this is ok. Sincerely, Anna Holmes [RE-DACTED]

Problem ID: 22775

Date: 12/16/2003

From: Kathleen Abernathy; Michael Copps; KJMWEB; Commissioner Adelstein
ANNETTE ALVAREZ

Subject: Obscenity in Billboard Awards

Dear Chairman Powell: Please, please, please take a stand against the barrage of obscenities we're confronted with each and every day over our radio waves and television signals. As a mother of 3 boys: 15, 13 & 9, I'm exhausted by the policing I have to do to keep them from hearing vulgar language intended to shock and tittillate. It doesn't matter the time of day. We've been accosted by vulgarities at 7 a.m. as well as 4:00 p.m., never mind the evening television hours. I resent that my children and I can't listen to the radio or watch tv together as I'm never sure what will or won't be said. I subscribe to the theory that parents are the first line of defense. In our family, we don't buy our children violent video games, we discuss music before it's purchased and we certainly don't allow carte-blanche viewing of movies without looking into why they're rated PG-13 or PG. It's still not enough. As much as I believe in personal responsibility, I also believe that society should function for the common good of its citizens. Please, tell me, what benefits do we derive from profanity being so ingrained in our culture? This is a vast, diverse, wonderful country that we are fortunate to claim as our own. We've had an illustrious past and should look forward to a future filled with won-

der and awe, but instead, I'm left shaking my heard that our civil society has found itself in a virtual cesspool of vulgarity. Commissioner, you're in a position to make a difference. Please take a hard look at what's happening and impose swift, strict penalties in each and every case for any violations of standards. It's the right thing to do. Sincerely, Annette Green [**REDACTED**].

Problem ID: 22787

Date: 12/16/2003

From: Carol Haglund

Subject: Profanity on TV

Dear Sir or Madame: I write this letter to voice my objection over the profanity on TV, particularly the use of the F word on the Billboard Music Awards by Ms. Richie. I have two young daughters, ages 12 and 14 and find it appalling that the use of the this kind of language is used on TV at all, let alone at 9:00 p.m. on a show that they would be interested in. Its bad enough that every subject relating to sex is available to them at any time of the day or night on TV. Where is it going to stop?? We have to stand up for what is right, not for what sells. Our children's moral future is at stake. Please do what you can to help the family's of this country try to do what is right. Carol Haglund [**REDACTED**]

Mitzi T Gramling
Associate General
Counsel
MGRAMLING@MPR.ORG

MINNESOTA
PUBLIC RADIO®

Sept. 21, 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

Attn: William H. Davenport, Chief
Investigations and Hearings Division
Enforcement Bureau
Room 4-C330

Re: In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints

To the Commissioners:

We respectfully submit the following comments and declarations in response to the recent public notice in the above-referenced matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006) *("Public Notice")*. We believe that the unprecedented expansion of the regulation of broadcast "indecency" and "profanity" by the Commission over the past two years is chilling many types of expression that, in our judgment, the public ought to be able to see and hear, or unnecessarily subjects broadcasters to the risk of substantial fines or other sanctions, including non-renewal of their licenses, if they air such broadcasts. Submitted herewith are declarations by:

- Thomas J. Kigin, on behalf of Minnesota Public Radio/American Public Media
- Garrison Keillor
- Stanley A. ("Bud") Wilkinson, Jr., on behalf of *Broadway's Biggest Hits*
- Dennis Fisher, on behalf of Pennsylvania television station WNEP, and
- Robert J. Sikorski, on behalf of Niagara Frontier Radio Reading Service, Inc.

The attached declarations illustrate these effects, and I respectfully refer you to them.

Thank you for your attention to this matter.

Sincerely,

/s/ MITZI T. GRAMLING
MITZI T. GRAMLING
Associate General Counsel

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005; COURT REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS ORDER RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

Sept. 20, 2006

I, THOMAS J. KIGIN, do hereby declare as follows:

1. I am employed as the Executive Vice President and General Counsel of Minnesota Public Radio/American Public Media ("MPR/APM"). I make this Declaration on MPR/APM's behalf in response to the recent Public Notice in the above-captioned matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints, DA 06-1739* (rel. Sept. 7, 2006) (*"Public Notice"*). Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained by MPR/APM in the ordinary course of its business and I would be competent to testify to the facts set forth herein.

2. MPR, a non-profit organization, is a regional public radio network based in St. Paul, Minnesota that serves some 650,000 listeners each week across seven states on 37 public radio stations. MPR provides three program services: a news and information service, a classical music service, and a contemporary music service. In addition, as American Public Media, MPR/APM produces more nationally distributed original programming, including documentaries and news programming, than any other station-based public radio organization—indeed, national programming produced by MPR/APM reaches some 14 million people per week. MPR/APM has won more than 800 journalism awards, including the Peabody Award and the Alfred I. duPont-Columbia University Gold Baton in 2001. MPR/APM has over 740 affiliate stations around the country who broadcast programs produced and distributed by APM.

3. MPR/APM's target audience for most of its programming is obviously adults. However, we recognize that children may be listening along with their parents, while in the car, for example. While the vast majority of MPR/APM's programming does not involve language that may be viewed as inappropriate for children, or can be prepared without using such language, MPR/APM has on occasion, after giving the matter careful editorial scrutiny, included adult language in news reports and other programs where the inclusion of such language is, in our editorial judgment, important to the report or program. We do not include such language gratuitously, but sometimes conclude that to omit it would so change the quality of our content that its inclusion in our programming is, in our editorial judgment, essential.

4. As a result, MPR/APM has been and will continue to be directly and negatively affected by the FCC's expansion in enforcement of the prohibitions on broadcast "indecency" and "profanity" over the past two years and its effectively ad hoc approach in applying those prohibitions. Indeed, it now appears that the FCC will apply its prohibition of the so-called "F" word, and analogous words as well, based on its own judgments as to the context and the literary or political merit of the work in which the word appears.

5. The prospect of huge fines and the threat of license revocation and/or non-renewal for broadcast licensees have caused MPR/APM to alter the way it makes decisions about its programming. The enactment of the Broadcast Decency Enforcement Act ("BDEA"), which dramatically increases those fines, will no doubt exacerbate these negative effects on our programming decisions. Regrettably, MPR/APM's decisions are no longer based solely on editorial judgments that have well-served a large listener audience for many years, but instead on the prospect of crippling financial and legal risks for MPR/APM and its affiliates. MPR simply cannot risk either huge fines or license revocation for the MPR's 37 radio stations or APM's 740 affiliate stations if it were to guess wrong about what is now acceptable for broadcast.

6. In light of this enforcement regime, MPR has adopted a number of practices. For example, MPR/APM now briefs participants in live programming of the forbidden words (as best MPR/APM understands them) and requests that all participants refrain from using any of them. In one such instance, for example, highly-regarded Minnesota writer and musician Bill Holm

planned to read from a well-known poem during the program *"A Literary View®,"* which was to be recorded before a live audience at the College of St. Benedict in St. Joseph, Minnesota and then broadcast by MPR on its network of stations the next day. The program was intended as a discussion among authors and musicians about the interrelationship of language and music. The poem in question, "Stella by Starlight," by Phil Bryant, addresses issues of language. In one passage of his poem, Bryant observes that, were one "to quote any passage out of Shakespeare, every other word was 'fucking' this and 'fucking' that." Admonished by MPR for fear of FCC sanction, however, Mr. Holm omitted the "F" words when he read the poem. And, thus, the version of the poem heard by MPR's listeners was as follows: ". . . to quote any passage of Shakespeare, every other word was 'dirty word' this and 'dirty word' that." The citizens of Minnesota can and do expect more from their broadcasters than this obsessive focus on individual words in larger works of considerable merit, but such an obsessive focus is precisely what MPR/APM, by virtue of the FCC's current approach regulating "indecency" and "profanity," coupled with the draconian fines available under the BDEA, must now employ.

7. Another example concerned a September 2004 interview with well-regarded poet and author Nick Flynn, whose most recent book was titled, "Another Bullshit Night in Suck City." Mr. Flynn, an assistant professor of literature at the University of Houston, has won a variety of awards for his previous works, including the PEN/Joyce Osterweil Award, a Discovery/The Nation Prize, fellowships from the Library of Congress and the Guggenheim Foundation, and he was a finalist for the L.A. Times Book Prize. "Another Bullshit Night

in Suck City" is a memoir about Mr. Flynn's father, their relationship, and homelessness: Mr. Flynn's father was homeless late in his life, and the book's title is drawn from a phrase his father would utter to describe his life on the streets. The book, which has been widely praised and described by at least one critic as a "significant work of art," is available nationwide in most bookstores and, so far as MPR/APM is aware, in most libraries. It provides important social commentary and, for that reason, MPR/APM, like a number of other public and private broadcasters, undertook to interview its author. In the wake of the FCC's Golden Globes decision, however, MPR/APM was concerned that reciting the book's title on air could make MPR/APM a target for a complaint to the FCC, a concern that would be heightened today in light of the March 15, 2006 Omnibus Order ("Omnibus Order") which specifically found the use of the term "bullshit" to be indecent—despite its use to mean "nonsense" or something that cannot be believed, rather than to refer to an excretory function. *See* Omnibus Order ¶¶ 125-131. Accordingly, MPR/APM determined that it had no choice but to (1) warn parents at the beginning of the program that the host was about to interview the author of a book with a potentially offensive title, (2) use the full title of the book only once at the beginning of the interview, immediately following the parental notice, and (3) refer to the book in the remainder of the interview as "Another BS Night in Suck City." MPR/APM did so despite our belief that the audience would have understood the context in which the proper title was being used and would not have been offended by it, but MPR/APM had no confidence that the FCC would view the matter the same way if a person

not a regular member of MPR/APM's audience used the broadcast as an opportunity to initiate a complaint.

8. MPR/APM has a sister organization, non-profit Southern California Public Radio ("SCPR"). SCPR had, for several years, broadcast the audio from performances at LA Theater Works, a highly regarded forum for new plays and other performances in Los Angeles, on the station KPCC-FM in Pasadena, a station operated by SCPR. The broadcasts typically have been on Saturday nights at 8:00 p.m. local time—consistent with when the curtain typically rises on the live performances. To my knowledge, SCPR has not previously received a complaint or inquiry from the FCC regarding its LA Theater Works broadcasts. In 2004, however, SCPR broadcast on KPCC LA Theater Works' production of the Tony Award-winning play "Dinah Was," about music legend Dinah Washington. Not surprisingly, given Ms. Washington's life and times, the play contains various commonplace "swear" words and sexual expressions. As a result of the ongoing, heightened FCC enforcement activity, and the introduction of an earlier version of the legislation that has now been enacted as the BDEA, SCPR felt it had no choice but to temporarily remove the LA Theater Works broadcasts from the air until it could evaluate ways to minimize future broadcast of any potentially objectionable language. Having concluded that it is neither appropriate nor feasible to edit the performances for language, and because the contemporary playwrights showcased by LA Theater Works often use language that the FCC has indicated it would find sanctionable, SCPR has reluctantly moved the LA Theater Works broadcasts to begin at 10:00 p.m., in the FCC's so-called "safe harbor." Unfortunately, both SCPR and LA Theater Works have

concluded that broadcasts at this late hour will attract only a fraction of the former audience for this series of outstanding theatrical events. Furthermore, although SCPR never found it necessary to devote the staff time to screening the serious and well-regarded plays produced by LA Theater Works prior to broadcast, in the current legal and regulatory environment, SCPR has no choice but to perform a full legal review of each such script, at no small additional cost to the station.

9. The FCC's heightened enforcement regime likewise has and will continue to affect MPR/APM's decisions regarding news coverage. For example, MPR/APM has in the past had a practice of broadcasting comments from a range of citizens on controversial topics of public concern. Experience teaches, however, that mild profanity is commonly used by a large number of average adults, and that such profanity is particularly common as a means of expression in certain demographic groups. MPR's news division has found it necessary to engage in serious discussions about whether current regulations would permit it to broadcast a reference by one citizen to "kicking the President's ass," in the context of a critique of the current Administration. Depending on whether and to what extent the FCC makes good on what MPR/APM understands to be its pledge to investigate each complaint it receives about such language, MPR/APM may have to forego broadcast of such citizen opinions altogether, change the way it gathers and selects them for broadcast, or avoid interviewing persons likely to employ such words in their commentary. MPR/APM views each of these alternatives as unacceptable and a disservice to its listeners. But the threat of bankrupting fines or license revocation can make the otherwise unacceptable essential.

10. Four years ago, MPR/APM produced and distributed a documentary called "The Sonic Memorial Project," which chronicled the sounds and voices of the World Trade Center and its surrounding neighborhood. The documentary was broadcast on MPR stations and dozens of other public radio stations around the country. First aired on September 10, 2002, the program went on to receive the prestigious Peabody Award in 2003. The original broadcast included a poem by a Hilary North, who had survived the attacks, as follows:

> PAUL AUSTER (narrator): Hilary North worked at the Aon Corporation on the 103rd floor of Two World Trade Center. Hilary wrote this poem.
>
> HILARY NORTH: OK. The poem is called 'How My Life Has Changed.'
>
> I can no longer flirt with Lou.
>
> I can no longer dance with Myra.
>
> I can no longer eat brownies with Suzanne Y.
>
> I can no longer meet the deadline with Mark.
>
> I can no longer talk to George about his daughter.
>
> I can no longer drink coffee with Rich.
>
> I can no longer make a good impression on Chris.
>
> I can no longer smile at Paul.
>
> I can no longer hold the door open for Tony.
>
> I can no longer confide in Lisa.
>
> I can no longer complain about Gary.

I can no longer work on a project with Donna R.

I can no longer get to know Yolanda.

I can no longer call the client with Nick.

I can no longer contribute to the book drive organized by Karen.

I can no longer hang out with Millie.

I can no longer give career advice to Suzanne P.

I can no longer laugh with Donna G.

I can no longer watch Mary Ellen cut through the bullshit.

I can no longer drink beer with Paul.

I can no longer have a meeting with Dave W.

I can no longer leave a message with Andrea.

I can no longer gossip with Anna.

I can no longer run in to Dave P. at the vending machine.

I can no longer call Steve about my computer.

I can no longer compliment Lorenzo.

I can no longer hear Herman's voice.

I can no longer see the incredible view from the 103rd floor.

I can no longer take my life for granted.

This poem, including its reference to "watch[ing] Mary Ellen cut through the bullshit," was included in the broadcast in unedited form in 2002. When this program

was rebroadcast on September 8, 2006, however, APM reluctantly felt that it had no choice but to alert its affiliates and to "bleep" this word out of Ms. North's poem for fear that a complaint to the FCC might result in the imposition of substantial fines. One affiliate e-mailed us to convey that it "appreciate[d] the redistribution of the program for a powerful commemorative event for 9/11," but also complained that, by not warning the affiliate of this language early enough in its view, it potentially subjected the affiliate to fines as well:

> Given the FCC's explicit ruling on that particular word and its derivatives . . . we would have hoped the producers would have identified this earlier before redistribution of this program.
>
> It's a sad commentary indeed that we have to worry about such things, but we can't be a test case.
>
> . . . Our broadcast version will include our best attempt at an edit to keep ourselves clear from a potential complaint.

And, thus, Ms. North's memorial to her colleagues was truncated for fear of government sanction, even though the original broadcast had aired without complaint.

11. Two additional recent examples further illustrate this point. The issue of the use of expletives in news reports arose just last week in coverage of the shooting rampage at in Montreal, Quebec at Dawson College, a school for students between high school and college. APM distributes a current affairs program produced by the Canadian Broadcasting Corporation ("CBC") called "As It Happens." For more than 35 years, "As It Happens" has explored the heart of cur-

rent events by talking to participants by telephone. On the day of the Dawson College shooting, the "As It Happens" program began with an interview of a 17-year-old student named Zachary Boucher, who had two friends shot in the rampage, one of them standing nearby him at the time as he crouched behind a car. In describing the day's events on the air for almost five minutes, he used the word "fuck" several times and the word "bullshit" once. He otherwise provided a thoughtful, first-hand perspective from a student on the scene well before most American media had arrived. As Canadian broadcasters are not subject to the same strict enforcement regime as their U.S. counterparts, the CBC aired the interview with Boucher in tact. APM, however, "bleeped" these words before distributing the program to U.S. stations and their listeners. Still, to further minimize its risk (for example, based on a fear that the "edited" version was not sufficiently well edited to satisfy the FCC) our sister organization, SCPR, elected not to air the broadcast at all on KPCC and instead broadcast different news coverage during that portion of "As It Happens."

12. On July 17, 2006, during the closing lunch at the Group of Eight summit, President Bush, unaware that microphones were still on, expressed to British Prime Minister Tony Blair frustration that the United Nations had been unable to deter Hezbollah and its backers in Syria from continued attacks on Israel: "See the irony is that what they need to do is get Syria to get Hezbollah to stop doing this shit and it's over." National Public Radio's program *All Things Considered*, which MPR stations air, included the full unedited audio of President Bush's use of the word "shit." Substantive commentary by the President to another world leader about war in the Middle East is, despite its use of a word that the

FCC would otherwise consider to be "indecent" and "profane," clearly something that our listeners as citizens ought to be able to hear in the words the President actually used. However, airing this newsworthy report potentially subjected each of our stations to a $325,000 fine. MPR should not be forced to face the choice between reporting conversations between our President and other world leaders in an unvarnished fashion or risking huge fines or license revocation.

13. Similarly, MPR's news division has also been forced to address whether and to what extent, in the current legal and regulatory environment, we can safely broadcast interviews of and documentaries concerning drug abusers, prisoners, and even teenagers generally, given the propensity of persons in each of these groups to use language that other people may consider "indecent" or "profane." Yet, MPR cannot, on the one hand, purport to be providing an accurate profile or portrayal of such individuals and, on the other hand, coerce those individuals into changing their speech patterns and avoiding what, for them, is customary vocabulary, before MPR turns on its microphones.

14. Likewise, MPR/APM staff members have been forced to address the potential legal ramifications of broadcasting from venues where music is playing in the background of the event, since such music may contain words that the FCC deems "indecent" or "profane." This issue arises in, among other contexts, political reporting, when correspondents reach out to interview members of certain demographic groups gathered in bars that feature music with lyrics that may run afoul of the law, or at gatherings where such music is playing.

15. Similarly, music programming at MPR has also suffered. We have an internal policy about profanity, indecency, vulgarity and blasphemy. However, our concerns are very much heightened due to the current regulatory environment, especially on our contemporary music service. Facing such large potential fines from the FCC, we have each new song reviewed by two people before it can be aired and, as a result, our process for getting new music on the air is incredibly slow and it is hard for us to remain timely. This process of having two people review each song has added considerable additional cost to our operations. Our production staff finds it difficult to know what to edit since there is no list of what is acceptable and what is not. In general, our staff is terrified that it will make a mistake and play something that might subject us to fines. This means that they take fewer chances and that fewer songs are aired in the unedited form in which the artists created them - and in which, in our experience, most listeners want to hear them.

16. Even MPR/APM's coverage of significant historical events can be compromised by the current enforcement of the "indecency" and "profanity" regulations. A documentary produced by MPR/APM in late 2003, titled "The President Calling," was based on and included excerpts from the White House telephone tapes of, among others, President Richard Nixon. Observing that President Nixon was elected on a platform that called for restoring "decency" to the White House, the report explores the conflict between Mr. Nixon's beliefs and his behavior as president, chronicling the "real" Nixon as he conducted business from the Oval Office. Thus, the report included recordings of President Nixon talking to government officials using such phrases as, "I don't like

the son of a bitch," and "do that right away or goddammit I'll fire this whole fucking staff, do you understand that?" President Nixon's use of this language, in the Oval Office and for official business, is precisely the point of the documentary. Under the current state of the law, and particularly in light of the enhanced penalties provided in the BDEA, however, MPR/APM is unsure whether it or any other public radio station could safely re-broadcast this documentary without editing *out* the precise words that illustrate the documentary's point. It would be far too easy for someone who disagrees with the documentary's point of view to file a complaint with the FCC, at a minimum potentially provoking a costly Letter of Inquiry and, at worst, subjecting stations airing it to crippling sanctions. And without any meaningful guidance as to which way the FCC will go, MPR/APM could not take that risk.

17. The recent proceedings at the FCC have made clear that it will likely impose fines or even license forfeiture for each utterance of the word "fuck" and "shit." While the FCC has attempted to suggest in its *Saving Private Ryan* order that such words might be acceptable in certain contexts, the Omnibus Order—particularly its finding that similar language used in a Martin Scorsese documentary about blues musicians was "indecent" and "profane," *see* Omnibus Order ¶¶ 72-86—leaves us unable to predict in any meaningful way whether language used in our programming will be deemed to run afoul of the FCC's rules and will subject our stations and affiliates to fines, or worse. This uncertainty has itself caused MPR/APM to make changes in its programming to protect itself from censure, because the price of guessing incorrectly has changed dramatically over the past two years, and all the more so with

enactment of the BDEA. Those extraordinary fines, coupled with the FCC's avowed determination to punish every utterance that its staff or commissioners determine is "indecent" or "profane," means that MPR and the stations that broadcast its programming will have to avoid words and topics that are even potentially sanctionable. This need to stay far clear of the uncertain prohibited zone has and will continue to prevent MPR/APM from fulfilling its mission of serving the news and entertainment needs of the communities in which it operates. MPR/APM quite literally cannot afford the price of being wrong, even once.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: St. Paul, Minnesota
Sept. [20], 2006

/s/ THOMAS J. KIGIN
THOMAS J. KIGIN

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005; COURT REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS ORDER RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

Sept. 19, 2006

I, GARRISON KEILLOR, do hereby declare as follows:

1. I am a radio broadcaster and, among other broadcasting-related activities, I am the originator and host of the public radio program, "A Prairie Home Companion," a chronicle of life in Lake Wobegon, Minnesota. I make this Declaration in response to the recent Public Notice in the above-captioned matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section III. B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006) *("Public Notice")*. Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained in the ordinary course of business and I would be competent to testify to the facts set forth herein.

2. As those who have listened to "A Prairie Home Companion" know, Lake Wobegon is a town of two-thousand souls in central Minnesota, predominantly Norwegian Lutheran and German Catholic, set amidst rolling hills on the edge of the great prairie, marked by a water tower and a grain elevator and the steeple of Our Lady of Perpetual Responsibility. For thirty years, I've told stories on the radio about its inhabitants and their ordinary lives, stories that for some reason radio listeners have been amused or comforted or moved by. Very often, as I tell them, I am aware of censoring myself, omitting detail, drawing a curtain, which I do because radio is an intimate medium and I don't want to offend people, and I am my parents' son, but even so, some people are sometimes deeply offended by what I say or how I say it. Tastes vary. For example, some people bridle at any reference to bodily functions. In Lake Wobegon, people's bodies function pretty much the same as everywhere else. Sometimes these things are of interest. I work out these questions on the spot, by intuition and conscience, and if I offend people, then my radio show pays the price for it in the sense that those who are offended tune the program out. Nobody is seriously injured. That, it seems to me, is the most effective sanction for the broadcast of "inappropriate" material, and the only one consistent with the freedom of speech (and conscience) to which all citizens are entitled.

3. Indeed, as a creator of radio programming, most of which is produced in front of a live audience, it is essential that I be respectful of and responsive to my listeners. But it is equally essential that I be true to the realities of the life experiences on which I draw for the stories I tell, which, if not always about "real" people, are always about how people really are. And that in-

cludes, from time to time and in ways I consider appropriate, discussing the kinds of things that really happen to people, and the words they really use to describe them.

4. As someone who aspires to be a responsible broadcaster, however, I am obliged to keep in mind the limits that the government at least claims it is entitled to impose on the content of my programs (which for the most part are carried on broadcast radio, not cable or satellite channels), not least because I have no desire to put the licenses or funds of the stations that carry my programs at risk. In this regard, the FCC's unprecedented construction and enforcement, beginning in 2004, of the statutes that prohibits the broadcast of "indecency" and "profanity" have had and continue to have a substantial negative impact on the my programming. Beginning in early 2004, the FCC's expanded definitions of these terms and its determination to apply the maximum fines to violators have caused me to engage in self-censorship in the production of "A Prairie Home Companion" for fear of being exposed to or exposing the stations that carry the program to severe financial and legal penalties. This is particularly so given what I understand to be a determination by the FCC to sanction even isolated or fleeting broadcast of even a single word falling within its almost unbounded definitions of "indecent" or "profane." The passage of the Broadcast Decency Enforcement Act of 2006 ("BDEA"), with its greatly increased financial penalties, substantially exacerbates this incentive to self-censor.

5. Put simply, these legal developments of necessity influence the way that the radio stations that broadcast my programs evaluate my choice of material. And the

prospect of that evaluation of necessity influences the material I choose. I understand that some people, including, apparently, a substantial number of FCC commissioners and at least some congressmen, think that is a good thing. I am not so sanguine that the commissioners or congressmen, or their respective staff members, are better judges of what is suitable material for broadcast than are my listeners. By way of one example, attached to this Declaration as Exhibit A is an exchange of email messages between the management of a Texas station that broadcasts "A Prairie Home Companion" and a listener who was complaining about that station's "censorship" of the November 6, 2004 installment of the program for fear of FCC sanction. The listener forwarded the email exchange to my attention. Apparently, the station was threatened with complaints to the FCC for the broadcast of indecency or profanity because of a joke I told about whether born-again Christians should have the right to vote, since, as the punch-line goes, "being born again, they are no longer citizens of this country, but of heaven." Given the various definitions the FCC has said it will give to the term "profanity," which continue to change over time and which remain unclear, the station's fear of sanction presumably had been increased manifold. That means I need to think twice or three times about telling such jokes, no matter how astute an observation on our political culture I may think them, since I owe it to the stations that carry my program not to get them in trouble with the FCC if I can avoid it.

6. By way of another example, during the first week of April 2005, I broadcast a monologue that led to complaints. Now, I receive complaints about what I say on the radio from time to time, from people who disagree

with positions I have taken or views I have expressed, and this is their right and I am glad they write to me about it. But these complaints were about words I used, not the message I was sending. Attached to this Declaration as Exhibit B is the script for that monologue as it was broadcast. In the monologue I used the word "nigger" and the phrase "son of a bitch." These words are always crude, and sometimes wrong to use, but in the story I was telling, they had their place. I used them deliberately because they established clearly and concisely, the character of the person I was talking about - he was the kind of man who would use the word "nigger" to describe a Black American, and he was the kind of man that other people would call a "son of a bitch." That's exactly how the people of Lake Wobegon would talk about this man, and so did I. And in context, I think any reasonable adult would understand why. But a station called to complain that I was putting its money and its license at risk by using these words. I can't say whether the FCC would actually fine a station for broadcasting my monologue (indeed, the lawyers my colleagues and I asked about it told me they can't figure out the answer either, given the ambiguity of the law against indecent and profane radio broadcasts). But, what I can say is that this station told me clearly that *it* is afraid it will be fined, and so it has doubts about whether it should broadcast my monologue. The station that complained was nice enough to say that it "doesn't want to stifle my creativity," but that it "wants me to be aware of the changed environment for stations." That "changed environment" means censorship, pure and simple, every bit as much as if the government were doing it directly, rather than indirectly through sky-high fines and aggressive posturing.

7. Speaking for myself, I think it might well be impossible to work under stricter government regulation of my speech in regard to "indecency" or "profanity." It's hard enough to tell good stories well, without having to worry about what the government thinks of them. A law like the BDEA and the definitions the FCC is giving to the legal terms, that seek to impose more onerous burdens of "decency" on broadcasters than has been the case for my entire career in radio, would drive me crazy, plain and simple. As I said, some people might think that is a good thing. From where I sit, however, it seems to me such regulation will only serve to further limit the breadth of material available to listeners, and to reduce me to telling stories fit only for children. Stories for children are good things, but adults need stories, too.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: Minneapolis, Minnesota
Sept. [19], 2006

/s/ GARRISON KEILOR
GARRISON KEILLOR

From: Stewart Jacoby [mailto: stewartjacoby@kedt.org]
Sent: Tuesday, November 09, 2004 10:20 AM
To: James B. Stewart
Subject: RE: Prairie Home Companion

I appreciate your comments very much. We are not censoring the program in any way. The live program always airs intact. In fact, this is the only occasion in which a decision was made not to air the encore due to content. If no one had called in to complain there wouldn't have been a problem. You may have heard on the news several weeks ago, that the FCC fined a number of television stations across the country for carrying a program with material deemed to be indecent. The FCC admonished the local stations for not taking the initiative to censor the program, when they knew in advance the type of material contained in the program. I'm sure they'll appeal, but they have a whole lot more money for court battles than we do.

I hope you'll understand that our announcer was simply being cautious. He said some of the callers were rude and angry. When you're on the receiving end of those calls, it can have an affect on you. He didn't want to open himself up to receiving more such calls the following day, so that certainly had an impact on his decision. I was tied up over the weekend and he was unable to reach me. Had he reached me I might have come up with a different solution. I'm certain we're being overly cautious, and am very hopeful that the FCC comes up with fairer solutions on the decency issue. I'm sure you'll agree that what might be indecent to one listener, will not be to another. As far as censoring the program

one other time, I can't recall the incident you're speaking of. Please refresh my memory.

Finally, we receive a number of complaints on the content of A Prairie Home Companion on a regular basis. I believe it could be one of the reasons why financial support for the program has fallen off dramatically. During our pledge drive two weeks ago, I had a telephone conversation with one of our patrons who has pulled his support from our station because of the content of APHC and Whad 'Ya Know. So, we get it from both sides of the coin. The difference between commercial and public radio, however, is money. If someone is not happy with something they hear on commercial radio, they simply change to another frequency. If they're not happy with something they hear on public radio, they pull their money and no longer support us. If everyone did that, we would not be able to broadcast. So, we are constantly maintaining a delicate balance in an effort to keep the majority of our supporters happy and satisfied with our programming efforts.

Again, I really appreciate your comments. I know my e-mail is somewhat lengthy, but I feel you deserve an honest explanation. Thank you again. And, thanks for listening.

Best regards,

Stewart

--------Original Message--------

From: James B. Stewart [mailto:jbstew@cox-internet.com]
Sent: Monday, November 08, 2004 8:56 PM
To: stewartjacoby@kedt.org
Subject: RE: Prairie Home Companion

Mr Jacoby,

Thanks for the explanation. I find it difficult to believe the FCC would discipline or fine one individual public radio station in the country when others have aired the same program without fine or sanction. However if you truly feel that KEDT would be singled out for that sort of treatment based an "official complaint", then I understand your thinking. I don't agree with it, but I understand it.

What I would truly hate to think is that you chose to censor the program because a few cranks called in and whined and likely threatened to not renew their membership. Frankly I am very disappointed you did not run the program on Sunday. Since your station has a history of having censored Keillor on another occasion, it does make one wonder.

Sincerely,

James Stewart

From: Ludie Litz [mailto:ludielitz@kedt.org]
Sent: Monday, November 08, 2004 4:07 PM
To: jbstew@cox-internet.com
Subject: FW: Prairie Home Companion

-------Original Message-------

From: Stewart Jacoby [mailto:stewartjacoby@kedt.org]
Sent: Monday, November 08, 2004 3:43 PM
To: Ludie Litz
Subject: RE: Prairie Home Companion

Mr. Stewart:

Thanks very much for your e-mail. If you are talking about the Sunday encore of Saturday evening's broadcast, I discussed it with our weekend announcer. During Saturday evening's live performance, our announcer said he received over a half dozen phone calls from listeners complaining about some of the content of the program. The callers complained that some of the jokes, and I guess one in particular, was inappropriate-perhaps even indecent. Because of the complaints, he made the decision not to carry the Sunday encore.

The problem is basically this: According to recent FCC regulations and rulings, Mr. Keillor alone is responsible for the content of his show when it's broadcast live, but because the show's encore is recorded locally for playback on Sunday, we can also be disciplined and subject to fines if someone files an official complaint. Our announcer's actions were entirely appropriate under the circumstances. Please contact me if you have any more questions or concerns. Thanks again for your e-mail.

Best regards,

Stewart Jacoby
Director of Radio Programming

-------Original Message-------

From: Ludie Litz [mailto:ludielitz@kedt.org]
Sent: Monday, November 08, 2004 1:54 PM
To: Stewart Jacoby
Subject: FW: Prairie Home Companion

-------Original Message-------

From: James B. Stewart [mailto:jbstew@cox-internet.com]
Sent: Monday, November 08, 2004 1:37 PM
To: ludielitz@kedt.org
Subject: Prairie Home Companion

I was driving home from San Antonio this afternoon listening to 89.1 and caught the Nov. 6 Prairie Home Companion. I called my wife and suggested she might want to tune in at 4 p.m. to KEDT and listen to it. When I got in range I discovered you were not airing in Nov. show. Is there a reason why you did not broadcast the show?

James

Exhibit B

It has been a quiet week in Lake Wobegon. Easter came and went and all of the brass players for miles around were employed, some of the good trumpet players worked three and four services, playing "Jesus Christ is Risen Today" for the Methodists and then driving twenty miles to do it for the Lutherans and then off to do the Presbyterians and the Catholics. It is spring at last and the snow is almost gone, thanks to the big thunderstorm we got this week, and now the air smells like moss. Kites are out and Frisbees. The crocuses are coming up. Daylight Savings Time is here on Sunday [*sic*] The snowbirds are coming back from Florida, bringing back seashells, which we already have enough of, but if you don't collect seashells, how would you know you were in Florida? The squirrels are tearing around and people on bicycles and geese are flying in and people are starting to sleep with their windows open and in the morning they're awakened by songbirds in the trees. The first ants have been seen. Not the ones who make the potato salad but the kind who go around with loads a hundred times their body weight. Though some of your aunts were strong women, and if you had their potato salad to eat every day, you'd increase your body weight a hundred times. There are blackbirds in town and mourning doves. Mourning with a u. Not morning, as in Monday morning, but mourning, grief. The doves are attending a funeral and making the appropriate soft sobbing sounds.

We've thought about death this week, as we've watched Pope John Paul II dying, preparing to be received into heaven, and as we've waited for that shy sweet lovely young woman in Florida to be ushered to her eternal

reward, a woman whose own life and personality and will was almost completely obscured by the lunatics who gathered around her these past few months. Theresa Marie, may the Lord gather her into His Presence and may eternal light shine upon her. And to my descendants—who may be in charge of me someday, don't wait that long, please. Or I will hang around your house afterwards and rattle your cupboard doors late at night and give you bad dreams.

There are people in the world, and I sort of envy them, who seem to live entirely in the present, but back where I come from, the dead stay with us, they never leave entirely.

I went to my cousin's house in Lake Wobegon and spent the night and I was not alone in that bedroom. There was a woman lying in the bed. She was waiting for her husband. She was worried and she was naked in the bed and sometimes she'd get up to go to the window and look for him. I could feel her agitation. And then he came in the room, very quietly. She lay quietly in bed. He lay down with his clothes on and he smelled of whiskey. She lay naked next to him. They lay together, breathing softly, not speaking. So much I wanted to say to them, but it was years too late.

My address book I have tried over and over to bring it up to date, there are so many dead people in there, so many phone numbers I used to know by heart and if I called them now, a stranger would answer. But I haven't been able to. Whenever I come to New York, I bring a number of ghosts with me, my father always comes—he was stationed in New York during the war, he was billeted in a hotel in Soho and he marched with his squad of postal clerks up Broadway to the Post Office

where they sorted mail going over to the troops in Europe. So he comes along, and various other aunts and uncles and my cousin Roger who drowned when he was 17 but who enjoys the city. I went to a restaurant for dinner last night, just me, but I thought of Roger. I had the sea scallops. In Lake Wobegon in 1956 when he died, we didn't have sea scallops. He would've liked them, so I enjoyed them even more in his behalf.

Of course it limits the sorts of things you can do in New York when you have these ghostly Sanctified Brethren walking along beside you. So they don't go into the movie theater with me. They wait outside. They've never gone to the opera with me. But they enjoy the parks and seeing the sights. My ghosts are not disapproving or censorious, even the ones who were in life: they seem benevolent to me. At least they don't bother to comment on what I'm doing. They just watch.

Not so with all ghosts. Daryl Tollerud's dad died years ago and he left a lot of anger behind that still troubles them. He was a farmer and all I remember about him is that he drove fast. You'd see him go by on a summer day, a cloud of dust behind him, going eighty miles an hour down a gravel road. Sometimes you could hear him go by in the night. He had about six busted power mowers in his garage, busted because he got mad at them for not starting and he yanked the rope so hard it broke the crankshaft or he'd kick it. His pickup had big dents in the side where he kicked it.

His wife died of cancer when she was 72. She went down rather gracefully, with very little complaining—insisted that she didn't want to be a burden to her family, so she went to the Good Shepherd Home and sat in a sunny

corner and read from the Psalms and had her chicken soup and faded away.

The old man was a handful. He got even angrier after she died. Threw away her stuff, her clothes, her books, her dishes, just threw it away, didn't take it to the Goodwill, or offer it to the children—he burned it and buried it. And then he settled into his cantankerous old age. He was somebody who when he came in to the Chatterbox Café for coffee, he always sat alone and you were glad he did. And after a few years he had a stroke. He was furious. It meant he couldn't walk. Couldn't or refused to walk with a limp. He lost the use of his right arm, pretty much. He couldn't speak very well, so he sat and fumed. Daryl did everything he could for his dad and put in ramps for a wheelchair and an electric lift so he could get in and out of bed and a new toilet with a handrail and a shower and opened up doorways so he could wheel around, and the old man came home and looked around and he said, "You're trying to kill me." They hired a young Filipino woman to come and care for him. "I don't want nigger women in my house," he said.

"Then you'll have to go back to the nursing home."

He sat and cursed them all in turn, and when Mari came, he refused to speak to her. But she was good to him. She was a saint. She worked out there seven days a week and did everything and her only time off was for Sunday morning mass. And then over a few months time, he became friends with her and refused to speak to his children. There were rumors that he and Mari were lovers. His children came to visit him for Christmas and he sat in his wheelchair, his big fierce eyebrows, glowering at them, and after an hour they left. He said, "Good. I have no children. The only one who understands me is

her"—and he pointed to Mari and his eyes filled with tears. "She's the only one."

He died in his sleep that spring. One morning he simply was gone. He had rewritten his will and left everything to Mari, the farm, the bank account, everything. His will was full of accusations against his children. Mari was a good woman and after the funeral she went to Father Wilmer and said, "This farm isn't mine, I can't accept it." And she signed it back to the children and left town with a check for a few thousand dollars, and that was that.

Except it wasn't. He is still there. Roaming around. You can feel his presence. In the pasture, the Holsteins lie grazing peacefully, and then, one by one, they get anxious and clamber to their feet and edge away—and you know, he's walked down there and he's yelling at them. They've had more car problems at the Tolleruds, more appliance problems—because the old man's ghost walks in and kicks the clothes dryer, opens up the hood of the car and he's angry because he doesn't understand how to fix it so he busts it. He did some good in the world: two of his daughters became therapists, motivated in some part by the fact that he was a son of a bitch. Their choice was between therapy and a life of psychopathic crime and they chose therapy.

I am grateful for my ghosts who are good people, slow to anger, patient, they keep their voices low. They were farmers who worked with horses and cows and so they make no sudden movements. You don't shout at cows, and you don't reason with them. You control them by closing off all other avenues except the one you want them to go, and then you get their attention by hitting them in a place where it does no harm, and then you lean

on them. And they go. Sometimes I feel as if my ghosts are doing this with me.

There was so much anger surrounding the gentle woman dying in Florida, a sort of flamboyant anger I remember hearing in some preachers when I was a child—an anger that makes a person grateful for the slight advances of civility in our time—certain things that were sins now considered illnesses—alcoholism, for example, taken out of the hands of preachers and given to therapists, which somewhat reduced the level of cruelty and probably is more in keeping with the spirit of the Gospels.

Here is to the gentle and the soft-spoken and the patient, wherever they are. May they wait patiently for their triumph, knowing it will come in good time.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C., 20554

IN THE MATTER OF COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005; COURT REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS ORDER RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCYCOMPLAINTS

Sept. 19, 2006

I, STANLEY A. ("BUD") WILKINSON, JR., do hereby declare as follows:

1. I am the sole proprietor of Broadway's Biggest Hits, a Connecticut-based business. I am also the host and executive producer of the syndicated radio program *Broadway's Biggest Hits*. I make this Declaration in response to recent Public Notice in the above-captioned matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006) *("Public Notice")*. Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained by *Broadway's Biggest Hits* in the ordinary course of its business and I would be competent to testify to these facts.

2. A true and correct copy of my professional biography is attached hereto as Exhibit A. As it illustrates, I have substantial experience as a print and broadcast journalist.

3. Since October 1998, the syndicated radio program *Broadway's Biggest Hits* has been pleasing tens of thousands of listeners in the U.S. and Canada each weekend by serving up "The Best of Broadway"—familiar songs from current and past musicals and interviews with well-known Broadway performers, composers and producers.

4. More than 150,000 listeners from coast-to-coast tune in for two hours on a lineup of stations that includes KIXI in Seattle, KOY in Phoenix, KEZW in Denver, WOKY in Milwaukee, WMLB in Atlanta, WZEZ in Richmond, AM 740 in Toronto and dozens more.

5. In marketing the program to potential affiliates, *Broadway's Biggest Hits* is described as "a radio program that happens to play Broadway music" as opposed to "a Broadway show on radio." It is designed to generate the largest possible audience and always takes into account the comfort level of listeners and the makeup of the target audience. While attracting listeners of all ages, *Broadway's Biggest Hits* appeals primarily to educated, affluent listeners, who love Broadway show tunes and who know the content of the musicals and the context of the specific songs. Rarely do they complain about material presented in the show.

6. What was acceptable for airplay, though, has changed dramatically over the past couple of years. Popular songs that were long enjoyed by listeners began to be considered improper by affiliates, who have become increasingly fearful of Federal Communications Commission fines.

7. The result is that listeners have been deprived of some classic songs-songs that relate in important ways to our cultural heritage, and thus to our views of ourselves as Americans. Indeed, even a program as "mainstream" as *Broadway's Biggest Hits* has been forced to rethink what it can broadcast without fear that the carrying stations will incur a government investigation (and the costs that even a Letter of Inquiry from the FCC can impose) or substantial fines, or will have negative comments placed in their license renewal files. Self-censorship—as opposed to mere radio professionalism is occurring at *Broadway's Biggest Hits*, and I assume at other equally well-regarded and heretofore innocuous programs—despite the fact that no listener has complained.

8. The first hint of affiliate fear came to my attention on July 27, 2004 when Bob Barnum, program director of Cumulus Media's WFAS in Westchester County, New York, e-mailed to report that parts of the song "Dance: Ten, Looks: Three" from the Tony Award-winning musical "A Chorus Line" (the fourth longest-running show in Broadway history) scheduled to air that coming weekend, were "not appropriate" for broadcast: "I do not wish to be perceived as a prude," Barnum wrote. "I have seen 'A Chorus Line' and loved it from beginning to end. However, . . . ('Dance: Ten, Looks: Three') is unacceptable on our radio station (*especially in the current FCC climate*) and will be edited out for the WFAS-AM broadcast." Barnum added, "Please try not to include such songs in future shows." A true and correct copy of the e-mail from Barnum is attached hereto as Exhibit B.

9. Prior to this, "Dance: Ten, Looks: Three" aired five times between 2001 and the end of 2003 without a whisper of complaint. The song humorously looks at the advantages of plastic surgery to enhance one's job prospects at theatrical auditions; jokingly (or perhaps not so jokingly) suggesting that improving one's "tits and ass" can change one's life.

10. Upon receiving Barnum's e-mail, I immediately responded in a two-fold manner: I e-mailed all affiliates, alerting them to the situation, and re-produced the segment containing "Dance: Ten, Looks: Three"—replacing it with another song. The e-mail to affiliates read:

> TO: Affiliates
>
> FROM: Bud Wilkinson
>
> Just want to alert you to a song in segment two of Hour Two of this weekend's show that may "push the envelope" and be inappropriate to some of you given the current climate at the FCC, and make you aware that an alternate segment is available.
>
> The song in question is Dance: Ten, Looks: Three from A Chorus Line, the musical about what it's like to be a dancer on Broadway. The song humorously tells of how plastic surgery and improving one's "tits and ass" can improve one's chances for a job. This song has been played many times in the past without a problem or complaint. It's a funny song, complete with context, and most listeners are adults.
>
> However, if you feel it's now inappropriate given the current "chill," be [*sic*] please be aware that an alternate version of the segment without that

> song is now available at [Internet .ftp address]. It's in the July 31-Aug. 1 folder and is clearly labeled.
>
> Needless to say, that song and a few other favorites will be shelved until the climate changes in Washington.

A true and correct copy of my e-mail is attached hereto as Exhibit C.

11. My reason for acting as I did is because my customers are the affiliates, not the listeners. The listeners are the beneficiaries of my product, but the affiliates provide me with access to them. If the affiliates are fearful of the FCC—and they clearly are—well, then I am as well.

12. While most affiliates ultimately felt that "Dance: Ten, Looks: Three" was suitable for airplay, and that their listeners were sufficiently mature to handle the song, a few stations went with the alternate segment. Among those airing the revised version were Clear Channel's KABL in San Francisco and Adventure Radio's WLOW in Savannah/Hilton Head. In detailing why KABL took the safer route, program director Clark Reid simply explained, "They're pretty touchy about that kind of stuff around here right now." In a subsequent e-mail, Reid added, "Frankly, Bud, isn't this the craziest of times? It's like the FCC is handing out scarlet 'As' with a big fine attached." A true and correct copy of Reid's e-mail is attached hereto as Exhibit D.

13. The stations that didn't have a problem with the song were in the majority. Cumulus Media's WINE in Danbury, Connecticut and WPUT in Putnam, New York only a half-hour drive north of WFAS—aired the pro-

gram as originally recorded. So did Clear Channel stations KOY in Phoenix and KBLU in Yuma, Arizona, with Susan Nickell of KBLU suggesting that she'd hear complaints from listeners if she didn't air "Dance: Ten, Looks: Three."

14. Nonetheless, the concerns of the few have now resulted in a full review of the *Broadway's Biggest Hits* playlist, the deletion of some well-known, popular and culturally and musically significant songs, and an "always looking over my shoulder" work atmosphere of second-guessing that continues today in which I either exclude or severely limit (in heavily edited form) the airplay of some classic Broadway songs. Among the songs now banned and/or censored from our playlist airing are "Master of the House" from "Les Miserables," "The King of Broadway" from "The Producers," "She Goes" from "High Fidelity," "Purpose" from "Avenue Q," "Great Big Stuff" from 'Dirty Rotten Scoundrels," "The Heat Is On in Saigon" and, ironically, "The American Dream" from "Miss Saigon"—in addition to "Dance: Ten, Looks: Three" from "A Chorus Line." Each of these songs was written and/or composed by noted artists, has been performed countless times on countless stages, and has been sold millions of times over on LPs, tapes and/or CDs. But these songs will no longer be heard (or only heard rarely in severely edited form) on my radio program - despite the fact that not a single listener has ever complained about them, and despite the mature makeup of the *Broadway's Biggest Hits* audience and the context and artistic merit of the individual songs.

15. Unlike songs from other genres—rap, rock or country—a show tune is a part of a complete show.

Each song has context and advances the storyline of the musical:

- "Dance: Ten, Looks: Three" suggests what producers and directors look for when casting shows, and does so in a comedic way.
- "Master of the House" from "Les Miz," another song that provides comic relief, has a corrupt innkeeper singing of how he manages to line his pockets while his wife laments, "Master of the house, isn't worth my spit; comforter, philosopher and lifelong shit." Prior to being dropped, "Master of the House" aired unedited 10 times over five years—without complaint. "Les Miserables" is the third longest running show in Broadway history (6,680 performances between May 1987 and May 2003).
- "The King of Broadway" from "The Producers" has the musical's central character, producer Max Bialystock, bemoaning his sagging fortunes and wondering, "Who do you have to fuck to get a break in this town." Prior to being dropped, "The King of Broadway" aired 11 times—without complaint. (It should be noted that only 20 or so songs are presented each week. The show has a policy of not airing the same song more than once every three months, so a song that has aired 11 times constitutes "heavy" airplay.) "The Producers" is arguably the most successful show in Broadway history—the winner of a record 12 Tony Awards. As of April 9, 2006, it had grossed more than $256 million on Broadway alone.

16. Based on my experience, listeners will find the absence of "Dance: Ten, Looks: Three" even more curious as a revival of "A Chorus Line" opens on Broadway this week. That a radio program showcasing Broadway musicals cannot include an important song from one of the most popular musicals of all time without causing problems for the stations that air the program is contrary to what our country is all about.

17. These and the other dropped songs are all a part of the cultural fabric of the country, but songs from them are now effectively being censored—after the marketplace has already decided that they are not only acceptable for airing, but has warmly embraced them. Indeed, these cuts in the playlist have occurred solely because of the fear engendered by the FCC's current enforcement regime and its vague and confusing interpretation of the laws. Moreover, the "chill" brought about by the FCC has caused a significant change in the work routine at *Broadway's Biggest Hits*. Time formerly devoted to cultivating new affiliates and ad sales now must go to the screening of new releases and reviewing music already in the library—a detriment to the show's bottom line that cannot easily be measured. Put simply, in producing the programming, rather than consider only what the listener might enjoy, I am currently forced to worry about the tolerance level of a few frightened affiliates, and the program suffers because of this. On the radio food chain, *Broadway's Biggest Hits* ranks at the low end. That a small, one-man operator, who is trying to promote Broadway music as an art form and Broadway itself as a tourist destination, should be sidetracked to such a degree suggests to me that the issue has gone too far.

18. Despite some occasionally saucy words, *Broadway's Biggest Hits* can legitimately be described as a family show. People of all ages do tune in. For a period of time, at least one college teacher that I'm aware of required that her students in the San Francisco area listen to the program for its educational value. Nowhere else could her students hear from the likes of composer/lyricists Stephen Schwartz ("Wicked," "Pippin," "Godspell"), Fred Ebb ("Cabaret," "Chicago") or Sheldon Harnick ("Fiddler on the Roof"), or stars such as Bernadette Peters, Shirley Jones, Nathan Lane and Antonio Banderas. Broadway music connects generations unlike any other style of music. Unfortunately, there are now some huge gaps in what is becoming a shrinking playlist, and therefore in the cultural connections the music engenders.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: Harwinton, Connecticut
Sept. [19], 2006

/s/ STANLEY A. WILKINSON
STANLEY A. ("BUD") WILKINSON

About Bud Wilkinson . . .

Award-winning print and broadcast journalist Bud Wilkinson hosts the syndicated radio show *Broadway's Biggest Hits* and writes the "Eye on Broadway" and "RIDE-CT" newspaper columns.

Broadway' Biggest Hits airs on approximately 25 stations, including Phoenix's KOY, Seattle's KIXI, Denver's KEZW, Toronto's AM 740/CHWO and Milwaukee's WOKY.

In Connecticut, where the show is based, *Broadway's Biggest Hits* is heard on New Haven's WQUN.

The "Eye on Broadway" column premiered in February 2003 in *The Litchfield County Times* in Connecticut. It takes readers into the dressing rooms of the stars of the biggest Broadway hits and offers the latest Broadway news.

The "RIDE-CT" column premiered in July 2005 in *The Republican American* in Waterbury, CT. It celebrates motorcycling and promotes safe riding.

A Connecticut native, Wilkinson spent more than two decades in high profile media positions in Phoenix, Arizona. He launched *Broadway's Biggest Hits* as a local show on KOY radio in late December 1997. It became an instant ratings success, prompting syndication nine months later.

Prior to creating *Broadway's Biggest Hits*, Wilkinson spent eight years as Entertainment Editor at Fox-owned KSAZ-TV (Channel 10) and Entertainment Reporter for news/talk KTAR radio, preceded by 10 years

as TV/Radio Columnist for *The Arizona Republic* newspaper.

A graduate of Vermont Academy in Saxtons River, Vermont and Ohio Wesleyan University in Delaware, Ohio, Wilkinson brings an award-winning background in journalism to *Broadway's Biggest Hits* and to the newspaper columns.

Wilkinson was honored with a Scripps Howard Foundation National Journalism Award in 1992 for a series of reports on adult literacy for Channel 10 and received a regional Emmy Award for commentary on Channel 10 that same year. He also won an Arizona Press Club Award for spot news reporting on a hostage situation at a Phoenix TV station in 1982.

During his career he has also written extensively for *Arizona Highways, Phoenix,* (Arizona) *Diamondbacks, Arizona Golf Journal* and *Passport* magazines as well as the entertainment/trade publications *Variety* and *Electronic Media.*

Wilkinson lives in Harwinton, CT and may be reached by phone at 860-485-0700 or by e-mail at either budw@broadwaysbiggesthits.comorbudw@ride-ct.com.

STANLEY A. ["BUD"] WILKISON JR.

[REDACTED]

Phone: [REDACTED] Mobile: [REDACTED]
Email: budw@broadwaysbiggesthits.com

SUMMARY

Experienced print and broadcast journalist with emphasis on entertainment and sports. Extensive reporting for major-market newspapers, TV and radio news organizations as well as magazines.

WORK EXPERIENCE

Executive Producer/Host, *Broadway's Biggest Hits* (1997 - Present)
Produce and host nationally syndicated weekly radio show. Book and interview guests, maintain contact with PR firms and CD labels, and write content for two-hour program of music and news. Also write and supervise content of BroadwaysBiggestHits.com web site.

Freelance writer (1997 - Present)

- **Eye on Broadway" column for *The Litchfield County Times* since February 2003.**
- **"RIDE-CT" motorcycle column for *The Republican-American* (Waterbury, CT) since July 2005**
- **Contributor of self-generated and assigned stories for *Passport*, *Arizona Highways*, (Arizona) *Diamondbacks*, *Phoenix* and *Arizona Golf Journal* magazines.**

Reporter/Entertainment Editor, *KSAZ- TV. Phoenix* (1989 -1997)
General assignment reporter with emphasis on entertainment stories for Fox-owned Channel 10. Packages for 6-9 a.m. and 5, 6, 9 and 10 p.m. weekday newscasts with daily live shots. Covered Super Bowl XXX and Grammy Awards in Los Angeles.

Entertainment Editor, news/talk KTAR Radio, Phoenix (1989 -1996)
Provided entertainment reports three times daily, including morning and afternoon drive times.

"Off-Ice" Reporter, *Cox Sports/ASPN* (1990 -1996)
Provided injury and strategy updates during stoppages in play, plus live intermission and postgame interviews with players and coaches during Phoenix Roadrunners' International Hockey League telecasts on regional cable network.

TV-Radio Columnist, *The Arizona Republic*, Phoenix (1979 -1989)
Reported and wrote daily media column for state's largest newspaper, covering both local TV and radio as well as national programming, issues and trends.

Reporter/TV-Radio Writer, *The Columbus (Ohio) Dispatch* (1976 -1979)
General assignment "state" reporter for one year covering multi-county area between Columbus and Cleveland before being promoted to TV-Radio column.

Reporter/Sports Writer, The Delaware (Ohio) Gazette (1975 -1976)

AWARDS

Scripps Howard Foundation National Journalism Award (1992) for year-long series on adult literacy on Channel 10 in Phoenix.

Rocky Mountain Emmy Award (1991-92) for general commentary on Channel 10.

EDUCATION

Ohio Wesleyan University, Delaware, OH - B.A. in journalism

Vermont Academy, Saxtons River, VT

Bud Wilkinson

From: "Bob Barnum" <bobb@mail.wfasfm.com>
To: budw@broadwaysbiggesthits.com>
Sent: Tuesday, July 27, 2004 1:42 PM
Subject: This coming weekend's show

Hello Bud,

I do not wish to be perceived as a prude. I have seen "A Chorus Line," and loved it from beginning to end. However, parts of it are not appropriate for on air broadcast. The number "Dance 10, Looks 3 " while great for Broadway, is unacceptable on our radio station (especially in the current FCC climate) and will be edited out for the WFAS-AM broadcast. Please try not to include such songs in future shows.

Bob Barnum
Program Director, WFAS-AM
[REDACTED]

Sent via the WebMail system at mail.wfasfm.com

Sent via the WebMail system at mail.wfasfm.com

Bud Wilkinson

From: "Gene Murrell" <murrellhb@yahoo.com>
To: "Bud Wilkinson" <budw@broadwaysbiggesthits.com>
Sent: Thursday, July 29, 2004 1:11 PM
Subject: Re: Broadway's Biggest Hits - Alternate segment for this weekend if necessary

So I guess that means Abie Baby from Hair won't be in the playlist anytime soon . . .

or how about La Vie Boheim from RENT?

The FCC is killing us!

How bout the you can be as loud as you want from ave Q?

Thanks for the heads up,. [*sic*]

----Bud Wilkinson <budw@broadwaysbiggesthits.com> wrote:

>TO: Affiliates

>FROM: Bud Wilkinson

>Just want to alert you to a song in segment two of
>Hour Two of this weekend's show that may "push the
>envelope" and be inappropriate to some of you given
>the curent [*sic*] climate at the FCC, and make you aware
>that an alternate segment is available.

>The song in question is Dance: Ten, Looks: Three
>from A Chorus Line, the musical about what it's like
>to be a dancer on Broadway. The song humorously
>tells of how plastic surgery and improving one's

>"tits and ass" can improve one's chances for a job.
>This song has been played many times in the past
>without a problem or complaint. It's a funny song,
>complete with context, and most listeners are adults.

>However, if you feel it's now inappropriate given
>the current "chill," be please be aware that an
>alternate version of the segment without that song
>is now available at *ftp://* . It's in the
>July 31-Aug. 1 folder and is clearly labeled.

>Needless to say, that song and a few other favorites
>will be shelved until the climate changes in
>Washington.

>

>Thanks,

>Bud

>

>_____

>Bud Wilkinson
>Broadway's Biggest Hits
>[REDACTED]

>

>Phone: [REDACTED]
>Cell: [REDACTED]
>www.broadwaysbiggesthits.com

Gene Murrell
Program Director
WLOW-FM
[REDACTED]

Do you Yahoo!?
New and Improved Yahoo! Mail- Send 10MB messages!
http://promotions.yahoo.com/new =mail

Bud Wilkinson

From: "Reid, Clark" <clarkreid@clearchannel.com>
To: "Bud Wilkinson" <budw@broadwaysbiggesthits.com>
Sent: Thursday, July 29, 2004 11:04 AM
Subject: RE: Broadway's Biggest Hits - Alternate segment for this weekend if necessary

Thanks, Bud.

They're pretty touchy about that kind of stuff around here right now. (Although personally, I heartily support T&A at every opportunity . . . it's just the spousal support for past T&A I resent!)

CR

--------Original Message--------

From: Bud Wilkinson [mailto:budw@broadwaysbiggesthits.com]
Sent: Thursday, July 29, 2004 7:49 AM
To: Undisclosed-Recipient:;
Subject: Broadway's Biggest Hits - Alternate segment for this weekend if necessary

TO: Affiliates

FROM: Bud Wilkinson

Just want to alert you to a song in segment two of Hour Two of this weekend's show that may "push the envelope" and be inappropriate to some of you given the current climate at the FCC, and make you aware that an alternate segment is available.

The song in question is Dance: Ten, Looks: Three from A Chorus Line, the musical about what it's like

to be a dancer on Broadway. The song humorously tells of how plastic surgery and improving one's "tits and ass" can improve one's chances for a job. This song has been played many times in the past without a problem or complaint. It's a funny song, complete with context, and most listeners are adults.

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Needless to say, that song and a few other favorites will be shelved until the climate changes in Washington.

Thanks,

Bud

Bud Wilkinson
[REDACTED]

Phone: **[REDACTED]**
Cell: **[REDACTED]**
www.broadwaysbiggesthits.com

Bud Wilkinson

From: "Reid, Clark" <clarkreid@clearchannel.com>
To: "Bud Wilkinson" <budw@broadwaysbiggesthits.com>
Sent: Wednesday, August 04, 2004 9:26 AM
Subject: RE: Broadway's Biggest Hits - "T&A" follow

Frankly Bud, isn't this the craziest of times?? It's like the FCC is handing out scarlet "As" with a big fine attached.

Thanks for the try on the ink!

C.

--------Original Message--------

From: Bud Wilkinson [mailto:budw@broadwaysbiggesthits.com]
Sent: Tuesday, August 03, 2004 5:04 AM
To: Reid, Clark
Subject: Broadway's Biggest Hits - "T&A" follow

Clark,

Damn, I tried to get your call letters in the NY Daily News. Here's what was in this morning's newspaper (see below) . . .

Kind of interesting how stations treated "Dance: Ten, Looks: Three." As best as I can determine, only WFAS and KABL had a problem with it. Clear Channel's KOY, KBLU and WOKY. The p.d. at KBLU in Yuma said yesterday that her listeners would lynch her if she cut such a well-known and clever song.

Seriously, I didn't have any problem whatsoever providing an alternate segment, and have dropped some songs from the playlist until the climate at the F.C.C. swings back the other way. Too bad the Chronicle does such a great job of ignoring radio. Maybe we could have gotten KABL a mention there are [*sic*] well, but I didn't even float it.

The NY Daily News column follows.

Bud

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005; COURT REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS ORDER RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

Sept. 19, 2006

I, DENNIS FISHER, do hereby declare as follows:

1. I am employed as the News Director of WNEP-TV16 in Moosic, Pennsylvania, and I make this declaration on WNEP-TV16's behalf in response to the recent Public Notice in the above-captioned matter. *FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints,* DA 06-1739 (rel. Sept. 7, 2006) ("Public Notice"). Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained by WNEP-TV16 in the ordinary course of its business and I would be competent to testify to the facts set forth herein.

2. WNEP-TV16 is a television station that broadcasts news, locally originated programming and programs distributed by the ABC network to communities located in Northeastern and Central Pennsylvania. Every weekday, WNEP-TV16 broadcasts 5.5 hours of regularly scheduled live news programs produced by WNEP-TV16, such as the acclaimed *Newswatch 16*, at various times during each weekday, and 4 hours of such programming during each Saturday and Sunday.

3. On March 21, 2004, during one of its regularly scheduled morning news programs, WNEP-TV16 broadcast live news coverage of the demolition of Philadelphia Veterans Stadium, the former home of the Philadelphia Phillies professional baseball team and Philadelphia Eagles professional football team. As the landmark stadium imploded and collapsed to the ground, one of the thousands of spectators who had gathered to observe the implosion yelled out the "F Word" loud enough to be captured in the live telecast.

4. WNEP-TV16, of course, has no way to control what may be said by participants in, or persons observing, live newsworthy events. Nevertheless, under the recently expanded enforcement activity of the FCC and the vaguely worded prohibition against the broadcast of "indecent or profane language," coupled with the dramatically increased fines established by the Broadcast Decency Enforcement Act ("BDEA"), providing live coverage of newsworthy events of interest and importance to the public places WNEP-TV16 under significant risk.

5. To lessen the risk posed by the new legal framework relating to the broadcast of indecent or profane speech, WNEP-TV16 has been forced to change the way

in which it covers live events where crowds are present. Among other things, I have directed WNEP-TV16's news staff that WNEP-TV16 may no longer provide live, direct-to-air coverage of these events unless they affect matters of public safety or convenience. Thus, news coverage by WNEP-TV16 of live events where crowds are present essentially will be limited to civil emergencies.

6. In lieu of live coverage, the heightened legal risks have forced WNEP-TV16 from time to time to transmit videotaped feeds back to the station for review before airing.

7. Before WNEP-TV16 broadcasts videotaped feeds or other news content, WNEP-TV16 personnel review the feeds and other content in an effort to keep from broadcasting language that may be deemed "indecent" or "profane" and thereby expose WNEP-TV16 to substantial legal and financial risks. However, given the vagueness of the terms "indecent" and "profane," it often is difficult to predict whether any given statement may run afoul of the law.

8. Because the severity of the risk to which broadcasters now are exposed, the news department of WNEP-TV16 has been forced to adopt a policy of not broadcasting speech that could be viewed as even close to the line of what may be prohibited. The natural consequence of the FCC's expanded regulation in this area and the passage of the BDEA is that WNEP-TV16, like other broadcasters, will engage in self-censorship and as a result will deprive people in the communities that we serve from receiving certain news and other constitutionally protected information.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: Moosic, Pennsylvania
Sept. [19], 2006

/s/ DENNIS FISHER
DENNIS FISHER

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005; COURT REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS ORDER RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

Sept. 20, 2006

I, Robert J. Sikorski, do hereby declare as follows:

1. I am employed as the President of the Niagara Frontier Radio Reading Service, Inc. ("NFRRS") and I make this Declaration on NFRRS' behalf in response to the recent Public Notice in the above-captioned matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006) *("Public Notice")*. Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained by NFRRS in the ordinary course of its business and I would be competent to testify to the facts set forth herein at a hearing or trial in this matter.

2. The NFRRS, founded in 1986 is a private 501(c)3 not-for-profit agency with broadcast studios and offices at 1199 Harlem Road, Cheektowaga, New York 14227, which administers an award-winning radio reading service for the blind and print-handicapped residents of the City of Buffalo and Western New York State. Its mailing address is: The Niagara Frontier Radio Reading Service, P.O. Box 575, Buffalo, New York 14225. Its mission has been to "Give the Blind a Chance to Read." As do other radio reading services elsewhere throughout the United States, the NFRRS has radio reading volunteers broadcast daily readings of newspapers, books, magazines, vital community information and other printed matter to blind and print handicapped persons, who are provided "reading radios," i.e., specially-tuned radio reading receivers. The NFRRS has been regarded as one of the finest radio reading services in the nation, broadcasting readings to those without sight 24 hours a day, every day of the year, to date, the NFRRS has broadcast most [*sic*] than 150,000 hours of radio readings to thousands of very appreciative visually-impaired area listeners. NFRRS' 300 radio reading volunteers broadcast readings of several daily newspapers, more than 50 community newspapers, more than 80 magazines and best-selling books; nearly 3,000 books, listed as "best-sellers" by the New York Times, have been presented by NFRRS radio readers. The agency has won many awards, including the New York State Governor's Eleanor Roosevelt Outstanding Community Service Award, the J.C. Penney Golden Rule Award, the Rudy Spitzer Outstanding Community Achievement Award, many governmental citations for exemplary service and thousands of individual accolades for caring community commitment. The NFRRS has been a final-

ist for broadcasting's coveted Peabody Award. As in the case of other radio reading services, the NFRRS' primary means of transmission is through the leased subcarrier of a local FM signal, 102.5 FM at 67mhz, which can be heard on fixed-position SCA receivers distributed to print handicapped persons by the agency. In addition, for the past 14 years, the NFRRS has also been carried on the Secondary Audio (SAP) Channel of local ABC-TV affiliate WKBW-TV/Channel 7, Buffalo, which has donated its SAP Channel, enabling people with stereo TV's to hear NFRRS readings. The SAP Channel carriage has been invaluable to the agency, not only promoting its existence but serving print-handicapped listeners who cannot be reached by the NFRRS FM-SCA signal. A number of special SAP-audio receivers have been distributed to visually-impaired persons by the NFRRS.

3. The blind and print-handicapped persons served by the NFRRS have been and will continue to be directly and negatively affected by the FCC's heightened enforcement of prohibitions on "indecency" and "profanity" in broadcasting and the Broadcast Decency Enforcement Act's ("BDEA's") heightened penalties for violations of Section 1464.

4. Since the NFRRS first went on-the-air on March 19, 1987, the Niagara Frontier Radio Reading Service for the Blind has had a policy of restricting the readings of best-selling books with adult situations to late-evening hours, i.e., no earlier than 10pm. Disclaimer announcements before such readings note that such readings may contain adult material and/or situations, and that listener discretion is advised. The Federal Communications Commission has long recognized the worth and

unique nature of radio reading services for the blind, even encouraging the at-cost provision of public broadcasting channel space to such services.

5. However, on February 11, 2005, a representative of WKBW-TV called the NFRRS to inform the agency that WKBW-TV had, without any advance notice to the NFRRS or its listeners, removed the NFRRS from the WKBW SAP Channel. The station had received only a single complaint from one caller about the "adult nature" of a NFRRS program aired the previous evening. Apparently, the program in question was an installment of the current bestselling novel "I Am Charlotte Simmons" by acclaimed author Tom Wolfe. Without giving the NFRRS any opportunity to respond, the station took the drastic action after 14 years of carrying NFRRS reading of books, magazines and newspapers. The station representative said that the station could not subject itself to potential heavy fines by the Federal Communications Commission, and that, shockingly, the NFRRS was "done" on WKBW-TV's SAP Channel.

6. The effect of WKBW-TV's removal of the NFRRS from its SAP Channel was staggering to the agency and to the print-handicapped listeners who depended upon the NFRRS. Suddenly, without warning, the NFRRS SAP receivers used by many visually-impaired listeners were worthless. In the two weeks that followed, there was a run on radio reading receivers, as blind people with SAP receivers rushed to exchange their radios for FM-SCA receivers. For the first time in more than a decade, the NFRRS' supply of usable receivers was exhausted. Those print handicapped persons wishing to gain access to printed matter through the NFRRS were unable to obtain a working receiver. Additional receiv-

ers will cost the NFRRS more than $90 each and are not available immediately. A particularly cruel note was that the NFRRS became aware that a number of blind people with suddenly non-working radios thought, mistakingly, that they had somehow broken their radios, and they were hesitant about letting the agency know about their problem. Meanwhile, thousands of people who listened to the NFRRS on their stereo TV were cut off. Sources indicate that WKBW-TV received hundreds of complaint calls about the sudden removal of the NFRRS from WKBW-TV's SAP Channel. The unfortunate action by a broadcast licensee in anticipated fear of possible extreme FCC punishment fines also generated an article in "The Buffalo News," a national Associated Press story carried by many newspapers nationwide, and an Albany, New York newspaper editorial cartoon lampooning the FCC as a giant with a whip posed to strike broadcasters.

7. Two weeks later, WKBW-TV resumed broadcasting the Niagara Frontier Radio Reading Service on the station's SAP Channel-but only during the hours of 6am-10pm each day, to avoid any possibility of the presentation of adult matter during the reading of best-selling books. As a result of a broadcast licensee's fear of FCC punishment, 1/3 of NFRRS readings-nearly 3,000 hours of readings per year-will be lost to SAP Channel listeners. They include many hours of general interest readings, offensive to virtually no one. For example, one of the best-selling books scheduled for 10pm airing-thereby unavailable to NFRRS SAP listeners-is the autobiography of Buffalo Bills Hall of Fame football coach Marv Levy-a book of great general interest to area residents. With 24 hour-a-day readings, it took the NFRRS 17 years to reach 150,000 hours of radio readings to the

blind. With the SAP restriction reducing SAP-accessed radio readings by 1/3, it would take 25 years - 8 years longer—to reach that milestone.

8. The arbitrary, unfair and inconsistent enforcement actions of the FCC undoubtedly have an unfortunate and perhaps unanticipated chilling effect on those seeking to provide radio readings to the blind, be they broadcast licensees or others. The FCC's willingness to threaten the fining of non-licensees already has concerned a number of volunteer radio readers at the NFRRS. Radio readers to the blind should be praised for their dedication in service to those without sight; they are literally sharing their sight with those who are unable to read the printed matter that most of us take for granted. Instead, the threats imposed by the FCC and BDEA have already frightened radio reading volunteers who give their time, talents and efforts to give the blind a chance to read. They should not face substantial fines for providing radio readings. The FCC has recognized the worth of radio reading services to the blind; it should not threaten to punish those who make radio reading to the blind possible.

9. As a result of the FCC and BDEA intimidation, the Niagara Frontier Radio Reading Service has incurred substantial losses. Its costs include the unanticipated provision of a substantial number of replacement radio reading receivers at about $90 each, as well as the loss of 33% of its broadcast hours on SAP. For the record, WKBW-TV recognized our agency's cost of providing replacement receivers, as it provided a contribution of $100 when it returned the NFRRS to its SAP Channel from 6am until 10pm. The clear unconstitutionality of FCC's stance and the BDEA applicable provisions have

and will result in many unfortunate and inappropriate results more than negating any potential positive impact on licensees alike. For the sake of print handicapped people who depend each day on their radio reading services, and for the sake of well-meaning radio reading volunteers making genuine profound contributions to our society, the overbearing nature of the FCC and BDEA approach must not be allowed to continue.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: [**REDACTED**]
Sept. [20], 2006

/s/ ROBERT J. SIKORSKI
ROBERT J. SIKORSKI

www.televisionwatch.org

Sept. 21, 2006

William H. Davenport
Chief, Investigations and Hearing Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-C330
Washington, D.C. 20554

Re: Court Remand of Section III.B of the Commission's March 2006 *Omnibus Order Resolving Numerous Broadcast Indecency Complaints*

Dear Mr. Davenport:

In response to the Commission's September 7, 2006 call for comment in connection with the court remand of its March 15, 2006 *Omnibus Order* resolving various indecency complaints, TV Watch respectfully requests that the Commission, taking cognizance of the views of the great majority of Americans, reject the *Omnibus Order's* constitutionally suspect approach to indecency enforcement.[1] Parents, not special interest organiza-

[1] *See FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006* Omnibus Order *Resolving Numerous Broadcast Television Indecency Complaints*, Public Notice, DA 06-1793 (rel. Sept. 7, 2006) (citing *Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir. Sept. 7, 2006) ("Remand Order") and *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices

tions or the government, should decide what is okay for their families to watch.

TV Watch is a broad-based coalition that opposes government control of television programming, preferring instead to promote the use of tools like content rating and parental controls that empower parents to manage their families' television viewing. TV Watch provides a much needed voice to the majority to Americans who prefer personal responsibility to government regulation. TV Watch consists of 27 prominent individuals and organizations that represent more than 4 million Americans. Its diverse membership includes, among others, broadcast networks, the Minority Media & Telecommunications Council, the National Academy of Recording Artists, the US Chamber of Commerce, as well as constitutional scholars and media experts.[2]

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of Apparent Liability & Memorandum Opinion & Order, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*")).

[2] Member organizations include: American Conservative Union; Americans for Tax Reform; Black Filmmaker Foundation; CBS; Center for Creative Voices in Media; The Creative Coalition; Center for Democracy and Technology; Media Freedom Project; The Media Institute; Minority Media & Telecommunications Council; National Academy of Recording Artists; NBC Universal; News Corporation; PSVratings; SpeakSpeak; US Chamber of Commerce. Individual members are: Jack Balkin, First Amendment Professor, Yale Law School; Braden Cox, Technology Counsel, Competitive Enterprise Institute; Susan Crawford, Professor, Cardozo Law School; Nick Gillespie, Editor: *Reason Magazine*; Jeff Jarvis, former TV critic for *TV Guide* and *People*, and creator of *Entertainment Weekly* and blogger for Buzzmachine.com; Brian Murphy, Adjunct Professor, New York Law School and partner, Frankfurt Kurnit Klein & Selz; Sal Severe, PhD, and author: *How to Behave So Your Children Will Too*;

The coalitions' guiding principles are the following: (1) Americans should determine what is seen and heard in their own homes, based on their personal tastes; and (2) the television industry should rate programs, advise viewers about the content that they are about to see, as well as promote awareness of the tools and information that allow parents to exercise control at home (through use of the V-Chip, cable and satellite parental controls, television rating and parental involvement).

The opinions of TV Watch reflect those of most television viewers. While a significant population is concerned about content on television, most say that goverment regulation is not the answer.[3] "An overwhelming majority of respondents (87%)—including 76% of those who 'often' see objectionable content and 86% of weekly churchgoers—also agree that '*if you don't like what's on television, change the channel, but don't deny everyone else the right to watch what they want to see.*"[4]

Americans simply do not want the FCC to play parent. For example, a nationwide survey conducted March 24-26, 2006 confirms that the vast majority of television viewers do not want federal regulators in their living

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Adam Thierer, Senior Fellow and Director, Center for Digital Media Freedom at The Progress & Freedom Foundation; Linda Gale White, former First Lady of Texas; Jack Myers, editor and publisher of the *Jack Myers Report*, *Media Village* and former TV executive.

[3] *See* Luntz Research Companies and Peter D. Hart Research Associates, *National Survey on Decency in Television*, available at http://www.televisionwatch.org/atf/cf/{084110DD-FDFD-481D-9E6F-755FD08705F2}/Luntz-Hart%20Survey.pdf.

[4] *Id.*

rooms. More than three-fourths of voters would be upset if government regulation limited their programming choices.[5] Moreover, fully two-thirds of voters believe that the government should not make subjective decisions about when the use of explicit language is necessary, whether in educational or artistic programming, as was the case when the FCC reviewed *Saving Private Ryan*, *The Blues: Godfathers and Sons*, and other content as part of the *Omnibus Order*.[6]

Americans understand that not all programming is intended for children. And government regulation is having a direct impact on what we all have the opportunity to watch on television. Television programs are already being changed or not aired at all, out of fear of government fines. The FCC should not censor broadcast programming based upon its own subjective views nor should it impose regulations that will lead to the chilling of speech.[7] It's what Americans don't see that may anger them as government makes decisions about what we all can and can't view.

Television content can be unpredictable at times, especially when it come to news and live broadcasts. Live television depicts reality and events as they happen

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[5] *See* TV Watch Press Release, *Survey: More Likely to Find an Adult Who Believes in Alien Abductions than a Voter who Wants the Feds to Pick What's on TV* (Mar. 29, 2006).

[6] *Id.*

[7] Government regulation is in fact chilling speech and threatening viewer choice. As the attached Exhibit A makes clear, broadcasters are being forced to edit or drop programs based on fear of FCC indecency enforcement action.

spontaneously, whether it be an overly excited fan at a sporting event, or the President of the United State engaging world leaders (as evidenced by President Bush's recent utterance of the S-word in a conversation with British Prime Minister Tony Blair, which was carried by several news organizations). Live television provides a direct link to the world and it should not be censored by the government.

TV Watch strongly encourages the Commission to consider fully the views of the vast majority of Americans and withdraw the *Omnibus Order's* constitutionally suspect approach to indecency enforcement. Responsibility and education, not more regulation, are the solution to any problem associated with children's television consumption.

Sincerely yours,

/s/ JIM DYKE

JIM DYKE
Executive Director
TV Watch
46-A State Street
Charleston, South Carolina 29401
(843) 722-9670

EXHIBIT A

THE CHILLING EFFECT

You may not know it, but TV programs are already being changed or not aired at all, out of fear of government fines. It's what Americans *don't* see that may anger them.

When CBS decided to rebroadcast the documentary *9/11*, 56 CBS affiliates—covering nearly 11% of US households—either refused to air the show or moved it to the 'safe harbor' out of fear they would be fined for the coarse words uttered by rescuers during the attacks. The program contains the only known footage of the first plane flying into the World Trade Center towers.

In response to 2006 FCC fines against a Martin Scorsese documentary about the blues and out of fear of recently increased fines, PBS has begun instructing its producers to self-censor all of its shows, including news programming like the acclaimed *Frontline*.

Scenes from the previously approved pilot of the WB series *The Bedford Diaries* were later censored by the network, against the wishes of the series director, in light of recent FCC enforcement decisions.

Garrison Keillor's national, daily five-minute poetry and history program was canceled by a Kentucky radio program after the word 'breast' was spoken

during a reading. After an outcry from the community, the show was reinstated.

- ABC now alters language and images in the long-running, Emmy Award-winning *N.Y.P.D. Blue* even though the now-edited content has been a staple of the show for over a decade.

- Fearing FCC fines, more than 80 percent of PBS affiliates declined to air an unedited version of the *Frontline* documentary "A Company of Soldiers."

- Phoenix TV stations dropped coverage of a live memorial service for Pat Tillman, the former football star killed in Afghanistan, because of language used by mournful family members.

  One third of the country wasn't able to watch *Saving Private Ryan* on Veteran's Day 2004, when stations declined to air in fearing action by the FCC.

- Shows like *Antiques Roadshow* must now screen items for 'indecency,' including such pieces of Americana as famous lithographs of Marilyn Monroe and illustrations of the female form in artwork from World War II bomber planes.

- The FCC investigated NBC's coverage of the Olympic Games Opening Ceremonies in Athens because historical depictions of Greek art and dance appeared in the broadcast.

For a documentary about South Africa, scenes of Nelson Mandela at a dance event were cut out because some women in the background were partially unclothed, as is the cultural norm in Africa.

- FOX edited testimony in *The Jury* (which examines the jury system) in a program involving child sexual abuse, even though it went to the crux of the case and the jury's verdict.

In the wake of FCC enforcement decisions, an episode of *That 70s Show* that won an award for its treatment of sexual health in a responsible manner has been shelved for reruns, even though it drew no complaints when it first aired.

80 percent of PBS affiliates rejected broadcast footage from the time leading up to the Iraqi elections and the battle for Fallujah because of explicit language used by the soldiers.

A *Family Guy* episode that aired 5 without incident years ago was later edited to remove a view of an animated character's buttocks. In another episode, an animated depiction in of a character breast-feeding was also altered.

An episode of *ER* was edited to remove a brief shot of the exposed breast of an 80-year-old women receiving emergency care.

# # #

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 06-1736

IN THE MATTER OF REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 *OMNIBUS ORDER* RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

Sept. 20, 2006

DECLARATION OF NICOLE A. BERNARD ON BEHALF OF FOX TELEVISION STATIONS, INC.

1. I am Senior Vice President of Broadcast Standards and Practices for the Fox Broadcasting Company, a position that I have held since April 2004. I currently oversee all day-to-day standards and practices operations for Fox Broadcasting Company, including all content approval and compliance processes for the network's entertainment programming and paid advertising content.

2. I am responsible for coordinating the submission of tapes to the Federal Communications Commission that are requested as part of its investigatory process. I also assist outside legal counsel in preparing Fox's formal responses to any Commission indecency inquiries. I am therefore familiar with the FCC's procedures for inves-

tigating, prosecuting, and dismissing complaints against the network.

3. It is my understanding that the FCC is actively investigating complaints against at least 75 Fox network programs or content broadcast by Fox's owned and operated television stations, and that these unresolved indecency complaints often lead to significant delays in the license renewal process for the affected stations.

4. I am increasingly concerned about the FCC's lack of transparency with respect to the indecency complaint process. The Commission has only recently (*i.e.*, within the last 6 to 9 months) agreed to provide Fox with the titles and broadcast dates of programs that it is investigating, and the FCC only does so if Fox makes a specific request. The Commission now provides copies of complaints, but redacts all of the complainant's contact information, including the community of residence. This redaction makes it impossible to verify that the complaint has identified the appropriate station. In addition, Fox is not apprised of indecency complaint dismissals without a direct inquiry, and even then, the FCC refuses to provide copies of dismissal letters. The Enforcement Bureau has advised the network that it must file a request under the Freedom of Information Act if it wants to obtain these dismissals. This convoluted process and the associated delays significantly undermine the network's ability to more fully understand the agency's indecency case law and to determine what is and is not acceptable for broadcast.

5. The Commission's dramatically expanded indecency enforcement, which began with its 2004 Golden Globe's decision, together with the ongoing investigation of over 75 complaints against shows aired on Fox or Fox-owned

stations, are having a dramatic chilling effect on writers, performers and producers of Fox network programming. With management at Fox increasingly nervous about stepped-up indecency enforcement in the context of a tenfold increase in fines, the network has become ever more cautious in editing out content that this FCC may find objectionable under its vague standards. Without question, content that previously was aired, or would have aired, on Fox, is left out of programs in this chilly environment. Following are some specific examples:

- FOX was forced to shelve an episode of "That 70s Show" that dealt with masturbation after a single airing. The episode, which neither depicted the act nor discussed it in specific terms, won a prestigious award from the Kaiser Family Foundation for an honest and accurate depiction of a sexual health issue.

- Hours before a live broadcast of "American Idol," Broadcast Standards and Practices forced producers to delete a clip from a Brittany Spears video that had aired numerous times on MTV, VH1 and other broadcast programs.

- The resources of no less than eight Standards and Practices executives were utilized to cover live broadcasts of the family-friendly "American Idol" (three on site, five covering the delay button and phone) out of concern that even the slightest unintended vulgarity or innuendo might generate a response from pressure groups or the FCC.

- For the 2004 and 2005 "Billboard Music Awards," FOX committed no less than seven Broadcast

Standards and Practices executives to cover this live show. Two executives were on-site in Las Vegas for several days, while four executives were directly on separate delay buttons (backed up by another executive on the telephone).

- Ten previously delivered episodes of "Cops" had to be re-edited so that, in addition to bleeping, mouths speaking profanities were blurred.
- For the rebroadcast of the "Family Guy" episode "Road to Europe," a shot of the nude buttocks of an animated couple at a rock concert was blurred.
- For the rebroadcast of the "Family Guy" episode "A Very Special Family Guy Freakin' Christmas", a shot of an animated baby's bare buttocks reflected on a Christmas tree ornament was removed.
- Although the highly acclaimed drama "House" is unanimously praised for dealing with numerous medical conditions in an honest and accurate fashion, Standards and Practices forced producers to completely re-write an episode that dealt with a patient struggling with psychiatric issues related to sexuality and animals. Although the topic contained no depiction or specific discussion of sexual activity, there was concern about the subject matter.
- "Prison Break" producers were forced to hire a Spanish language consultant after it was learned that Spanish words that were completely acceptable when spoken by a Puerto Rican character might mean something different in another Hispanic culture.

- A scene in a final cut of "Prison Break" featuring a fully-clothed woman sitting on top of a fully clothed man was removed. Although sex was neither explicit nor implied, the scene was edited to ensure it would not generate an FCC inquiry.
- Furious producers for "So You Think You Can Dance" were forced to blur a female dancer's birthmark on her cleavage out of fear that the birthmark might be mistaken for an areola/nipple.
- At unprecedented expense, no less than eight Standards and Practices executives were involved in covering Super Bowl XXXIX. Two executives were flown to Jacksonville to be on-location, four executives were on separate delay buttons, another executive was backing up on the telephone, and an eighth executive reviewed taped sports material in the days leading up to the game.

6. In general, Fox has had to increase staffing in my department between Fiscal 2004 and Fiscal 2007 by 70%, at a cost of $1,026,000, to respond to the FCC's stepped-up indecency enforcement regime.

7. All Broadcast Standards and Practices executives undergo rigorous training to ensure that objectionable content is caught prior to air. However, even despite this extensive preparation and training, perfect compliance with the network's broadcast standards and practices is not possible.

8. The network now utilizes four individuals on the "button" to censor potentially indecent live content. Despite this investment in additional full-time personnel, because this is an inherently human endeavor, it is

impossible to ensure that content violative of the FCC's vague indecency standard will never air on live television.

9. The current indecency regime is also upsetting the creative community due to the lack of certainty. Programs that once cleared the department must now be reevaluated as the FCC issues new indecency decisions. Furthermore, these changes often must be implemented rapidly which heightens the opportunity for error.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct

/s/ NICOLE A. BERNARD
NICOLE A. BERNARD
Senior Vice President
Broadcast Standards and Practices
Fox Broadcasting Company
10201 West Pico Boulevard
Los Angeles, CA 90035
(310) 369-0092

Sept. 20, 2006

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 06-1739

IN THE MATTER OF REMAND SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 *OMNIBUS ORDER* RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

Sept. 20, 2006

DECLARATION OF ED GOREN ON BEHALF OF FOX TELEVISION STATIONS, INC.

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1. My name is Ed Goren. I am President, Fox Sports, a position that I have held since April 2000. I am currently responsible for the look, sound, editorial content and superior quality of Fox Sports' studio and game broadcasts and I also serve as Executive Producer of all Fox Sports productions. I previously served as Senior Producer for CBS Sports, where I produced sports telecasts for every sport broadcast by the network.

2. The ability to present live sports programming to the Fox Sports audience is of critical importance. Viewers demand the most authentic and realistic presentation of sporting events in real time and without censorship. In addition to live broadcasts of the events themselves (with their accompanying play-by-play commentary), at

times the network also provides live audio from the field of play and live interviews with athletes before, during and after games. This coverage, which our viewers have come to expect, provides the audience a complete experience and helps fans feel like they are part of the action.

3. Due to recent FCC indecency enforcement action, however, Fox Sports is now faced with having to consider a delay even during live sports coverage because of the possibility that an on-air event may run afoul of the FCC's vague indecency standard. This is an unwarranted infringement on the sports production process that also thwarts the expectations of sports fans who desire to watch games live.

4. Even with a delay, moreover, in many cases it would be impossible for Fox Sports to review content to ensure compliance with overly-broad indecency restrictions. Broadcast standards employees would be forced to make split-second decisions about whether to censor content in an effort to comply with the FCC's indecency regulations. And they would have to make these decisions based on an inherently vague indecency standard that relies on context to an extraordinary degree. This very human endeavor would always be subject to error - both in terms of failing to edit potentially objectionable material and in accidentally editing out clearly legal content. This potential for error easily could lead to distorted coverage if perfectly legitimate content is inadvertently edited out.

5. Finally, for competitive reasons, Fox Sports' ability to present programming live and unadulterated is more important than ever. In an era of time-shifting made possible by digital video recorders, sports programs are one of the few remaining examples of "appointment tele-

vision." Fans demand that sports be shown live and will favor media that are able to provide such programming. Fox Sports' over-the-air broadcasts compete with other media that are not subject to the Commission's stringent and uncertain indecency regulations. The near ubiquitous availability of cable and the Internet means that consumers easily can migrate to other platforms where they can experience sports coverage live and without fear that it might be censored or edited solely because of fear of government enforcement. Thus, the Commission's indecency enforcement threatens the viability of live sports programming on over-the-air broadcast television and puts Fox Sports at a competitive disadvantage with other media.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct.

/s/ EDWARD G. GOREN
EDWARD G. GOREN
President, Fox Sports
Fox Broadcasting Company
10201 West Pico Boulevard
Los Angeles, CA 90035
(310) 369-1000

Sept. 20, 2006

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 06-1739

IN THE MATTER OF REMAND SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 *OMNIBUS ORDER* RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

Sept. 20, 2006

DECLARATION OF PETER LIGUORI ON BEHALF OF FOX TELEVISION STATIONS, INC.

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1. My name is Peter Liguori. I am President, Entertainment for the Fox Broadcasting Company, a position that I have held since March 24, 2005. I am currently responsible for all FOX network program development and scheduling, as well as marketing, business affairs and promotions. I previously served as President and Chief Executive Officer of News Corporation's FX Networks for seven years, where I oversaw business and programming operations for FX and the Fox Movie Channel.

2. The ability to present awards shows and other entertainment programming live to our audience is of critical importance to the network. Viewers demand the most authentic presentation of awards shows and other public

events in a way that is realistic and uncensored. The live presentation of awards shows and other popular entertainment programming (such as *American Idol)* is what makes this content so compelling.

3. Due to recent FCC indecency enforcement action, however, the network is forced to delay these broadcasts so that censors may attempt to bleep out or discard material that may run afoul of the FCC's vague indecency standard. This is a harmful infringement on the creative process that interferes with the desire of the viewing public to watch these events as they unfold.

4. Even with a delay, moreover, in many cases it is impossible for the network's broadcast standards group to effectively monitor live broadcasts. These dedicated employees must make split second decisions about whether to censor content in an effort to comply with the FCC's indecency regulations. And they have to make these decisions based on an inherently vague indecency standard that relies on context to an extraordinary degree. This very human endeavor is subject to error - both in terms of failing to edit potentially objectionable material and in accidentally editing out clearly legal content. As a result, unnecessary censorship is inevitable under the vague indecency standard. Such censorship inappropriately invades the creative process, leads to harmful distortions of broadcasts and threatens the future of live programming.

5. The threat is not merely theoretical. The network recently broadcast a program containing a live performance by a musician. Broadcast standards employees reviewed the song lyrics in advance and watched multiple dress rehearsals, all of which indicated that the performance would fully comply with the indecency rules.

During the timedelayed live broadcast, however, a vigilant standards employee bleeped a portion of the song's audio out of fear that an expletive had been used. A review of the material following the broadcast revealed that no expletive in fact was ever uttered, but by then the television audience had already been subjected to an unwarranted interruption of its enjoyment of the program.

6. Finally, for competitive reasons, FOX's ability to present entertainment programming live and unadulterated is more important than ever. In an era of timeshifting made possible by digital video recorders, awards shows and similar broadcasts of public events are one of the few remaining examples of "appointment television." The viewing public demands that such programs be shown live and will favor media that is able to provide such programming. The network is competing with other media that are not subject to the Commission's stringent and uncertain indecency regulations. The near ubiquitous availability of cable and the Internet means that consumers easily can migrate to the platform where they can get the most current and complete programming without fear that it might be censored or edited for reasons unrelated to creative judgment. Thus, the Commission's indecency enforcement threatens the viability of live programming on over-the-air broadcast television and puts FOX at a competitive disadvantage with other media.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct.

/s/ PETER LIGUORI
PETER LIGUORI
President, Entertainment
Fox Broadcasting Company
10201 West Pico Boulevard
Los Angeles, CA 90035
(310) 369-1000

Sept. 20, 2006

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 06-1739

IN THE MATTER OF REMAND SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 *OMNIBUS ORDER* RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

Sept. 20, 2006

DECLARATION OF DENNIS SWANSON ON BEHALF OF FOX TELEVISION STATIONS, INC.

---

1. My name is Dennis Swanson. I am President of Station Operations for the Fox Television Stations Group, a position that I have held since October 2005. I am currently responsible for managing the operations of the 35 television stations owned and operated by Fox, including the stations' local news operations. I previously served as Executive Vice President and Chief Operating Officer of the Viacom Television Stations Group, where I oversaw operations for the 40 television stations owned and operated by Viacom. I also have served in executive positions with the ABC and NBC networks and with local television stations in New York and Chicago.

2. The ability to present live news coverage is of critical importance to the Fox stations and to the viewing public. Particularly during emergency situations and breaking

news events, it is essential that viewers learn of vital news as it happens (*e.g.*, the great unifier in the community after the events of 9-11 was television and the information that it imparted). Presenting news on a live basis ensures that our stations' viewers receive the most authentic presentation of information in real-time, without censorship. While live news coverage provides extraordinary benefits to the public, it also carries certain risks due to its often unscripted and volatile nature. For example, stories about severe weather or military conflict can lead to very emotional reporting, but it is this extemporized coverage that makes live news so compelling and valuable to the public.

3. Due to recent FCC indecency enforcement action, however, the network is now faced with having to consider a delay even during news coverage because of the possibility that an on-air report may run afoul of the FCC's vague indecency standard. The FCC's content restrictions inappropriately infringe on journalistic freedom by forcing stations to choose between censoring broadcasts (and depriving the public of critical information) and risking severe penalties from a government enforcement action.

4. Even with a delay, moreover, in many cases it would be impossible for stations to review content to ensure compliance with overly-broad indecency restrictions. Employees enforcing broadcast standards would have to make difficult, split-second decisions about whether to censor news reporting in an effort to comply with the FCC's indecency regulations. Broadcast standards employees are not journalists and their efforts would necessarily interfere with both the right and the obligation of journalists to present the news as accurately as possible. Further, decisions about what news to censor would

have be made based on an inherently vague indecency standard that relies on context to an extraordinary degree. Any effort to censor the news would always be subject to human error - both in terms of failing to edit potentially objectionable material and in accidentally editing out clearly legal content. This potential for error means that non-journalists could unnecessarily restrict the flow of news to the audience.

5. Finally, for competitive reasons, Fox's ability to present the news live and unadulterated is more important than ever. The Fox stations are competing with other media that are not subject to the Commission's stringent and uncertain indecency regulations. The near ubiquitous availability of cable and the Internet means that consumers easily can migrate to other platforms where they can get the most current and complete news without fear that it might be censored or edited for reasons unrelated to news judgment. Such migration would not be entirely without cost, however; live, local news coverage is a distinctive feature of the broadcast offerings of local stations. If FCC regulation of live broadcasts threatens local news coverage, an important public service performed by local stations may be lost.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct.

/s/ DENNIS SWANSON

DENNIS SWANSON
President of Station Operation
Fox Television Stations Group
1211 Avenue of the Americas
New York, New York 10036
(212) 556-2400

Sept. 20, 2006

[REDACTED]

From: [REDACTED]

Sent: Wednesday, July 23, 2003 4:37 PM

To: M Powell

Subject: please consider

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, August 07, 2003 1:09 PM
To: M Powell
Subject: Be responsible

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, July 08, 2003 1:12 PM
To: M Powell
Subject: Indecent Scenes

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Thursday, Sept. 11, 2003 12:00 PM

To: Michael Powell

Subject: Do your Job!!!!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: **[REDACTED]**
Sent: Tuesday, Dec. 09, 2003 9:53 PM
To: KAQuinn
Subject: Raising My Voice With Others

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Jan. 08, 2004 11:36 PM
To: Michael Powell
Subject: indecent TV

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From:	[REDACTED]
Sent:	Friday, Oct. 03, 2003 11:05 AM
To:	Michael Powell
Subject:	Shame, shame on you!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Wednesday, Oct. 01, 2003 6:39 PM

To: Michael Powell

Subject: Let's work harder to maintain family values

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Oct. 14, 2003 6:10 PM
To: Michael Powell
Subject: Family First

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Dec. 22, 2003 2:29 PM
To: Michael Powell
Subject: Question

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Aug. 01, 2003 8:42 PM
To: M Powell
Subject: network programs

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Wednesday, Jan. 07, 2004 11:20 PM

To: Michael Powell

Subject: Enforce Your Regulations Correctly and Thoroughly!!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, July 23, 2003 4:38 PM
To: M Powell
Subject: ENFORCE LAWS

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Aug. 15, 2003 10:15 PM
To: M Powell
Subject: Looking back

Dear FCC Commissioner:

As an adult looking back at your childhood, when television was introduced and for many years afterwards, can you honestly say that you were harmed by not seeing adult nudity, violence, obscene language and the such? Were the programs you watched filled with kids insulting their parents and each other? Were the parents sneaking around or even openly cheating on their spouse? Were men dating men and women dating women? Of course NOT... Televison was good clean fun. What's wrong with bringing that back to today ... reset our standards?

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Sunday, Nov. 30, 2003 11:58 PM
To: Michael Powell
Subject: tv indecency

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, July 23, 2003 2:52 PM
To: M Powell
Subject: this is an outrage!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Jan. 07, 2004 4:39 PM
To: Michael Powell
Subject: Programming

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Aug. 14, 2003 7:29 PM
To: M Powell
Subject: Betraying America

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Oct. 10, 2003 4:28 PM
To: Michael Powell
Subject: Indecency in TV shows

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television? Do you not have families, with small children? Do you not care what is going on with the TV industry?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

I have a 6-1/2 year old boy and would be appalled if he was to witness this kind of adult female nudity. It is hard enough to find good programming on TV, it's another thing to try to not get sick to my stomach with the scenes in so many shows these days. I turn my TV off a lot more than I used to and it will be that way until the FCC starts screening and filtering the kin'd of shows that are being allowed to air.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Dec. 31, 2003 11:25 AM
To: Michael Powell
Subject: please mr. Powell

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, July 23, 2003 9:43 PM
To: M Powell
Subject: Please do your job well

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Aug. 08, 2003 12:27 AM
To: M Powell
Subject: Do your duty, please

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Aug. 01, 2003 9:47 PM
To: M Powell
Subject: Take Action

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Sept. 08, 2003 9:29 PM
To: Michael Powell
Subject: Do you have no morales??

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Dec. 29, 2003 4:50 PM
To: Michael Powell
Subject: NYPD Blue

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Tuesday, August 12, 2003 1:28 PM

To: M Powell

Subject: Enforcement

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I Implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From:	[REDACTED]
Sent:	Thursday, October 09, 2003 10:59 PM
To:	Michael Powell
Subject:	Gutless and Shameful

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, January 02, 2004 5:07 PM
To: Michael Powell
Subject: Start doing you job

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex; violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Wednesday, July 23, 2003 3:20 PM

To: M Powell

Subject: WHERE'S THE ENTERTAINMENT GONE TO

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity corning into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From:	[REDACTED]
Sent:	Wednesday, Oct. 01, 2003 2:27 PM
To:	Michael Powell
Subject:	Enforce broadcast decency laws

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Sept. 08, 2003 5:43 PM
To: Michael Powell
Subject: Concerns

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Oct. 17, 2003 3:00 PM
To: Michael Powell
Subject: My Children

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Jan. 13, 2004 4:45 PM
To: Michael Powell
Subject: Indecency to minors

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, July 21, 2003 12:15 PM
To: M Powell
Subject: Please listen to your viewers . . .

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Thursday, Jan. 29, 2004 9:34 AM

To: Michael Powell

Subject: Perform your appointed duty to protect America from this filth

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, July 08, 2003 12:07 PM
To: M Powell
Subject: Please fulfill your obligations to the Public

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Sept. 02, 2003 5:23 PM
To: Michael Powell
Subject: Please Read

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Sept. 16, 2003 3:51 PM
To: Michael Powell
Subject: TV programming

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Sunday, Sept. 07, 2003 9:58 PM
To: Michael Powell
Subject: Indecency on TV

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC. The barrage of homosexual programming is downright disgusting!

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Saturday, Nov. 01, 2003 11:20 AM
To: Michael Powell
Subject: Take responsibility!!!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Oct. 02, 2003 2:49 AM
To: Michael Powell
Subject: WHY?

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Sept. 08, 2003 11:35 PM
To: Michael Powell
Subject: This is unacceptable!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From:	[REDACTED]
Sent:	Thursday, Dec. 18, 2003 11:55 AM
To:	Michael Powell
Subject:	Enforcing Indecency Laws

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Saturday, Sept. 13, 2003 11:48 PM
To: Michael Powell
Subject: Responsible for Deterioration

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From:	[REDACTED]
Sent:	Tuesday, Feb. 17, 2004 8:51 AM
To:	Michael Powell
Subject:	Trashy Programming

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Feb. 13, 2004 11:25 AM
To: Michael Powell
Subject: Elections, Politions and Other Used-To-Be

Dear FCC Commissioner:

It is time to say good-by!

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Saturday, Nov. 22, 2003 5:26 PM
To: Michael Powell
Subject: INDECENCY

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From [REDACTED]
Sent: Thursday, Dec. 18, 2003 7:29 AM
To: Michael Powell
Subject: one dad's opinion

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, July 29, 2003 10:58 AM
To: M Powell
Subject: Indecent T.V.

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Wednesday, Mar. 31, 2004 11:25 PM

To: Michael Powell

Subject: Disregard of Responsibility Regarding Vulgarity and Indecency on TV

Dear FCC Commissioner,

Why do you continue to disregard your obligation to protect our citizenry from the constant barrage of indecency on television?

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionyouth.com, I respectfully implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From:	[REDACTED]
Sent:	Tuesday, Feb. 17, 2004 8:11 AM
To:	Michael Powell
Subject:	FCC AND NETWORK BROADCASTING

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity corning into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Oct. 17, 2003 5:00 PM
To: Michael Powell
Subject: Indecency on Television

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Oct. 02, 2003 9:59 AM
To: Michael Powell
Subject: Please take action . . .

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

Another example is all the JUNK on Fox lately. I can't even allow my 5 year old to watch the COMMERCIALS for these during the packer game!!! That is totally rediculous! Why do we want to sacrifice our childrens moral upbringing for a few advertising bucks!?!

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Oct. 01, 2003 8:11 PM
To: Michael Powell
Subject: network programming

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Jan. 02, 2004 9:58 AM
To: Michael Powell
Subject: tv-moral filth

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYFD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Dec. 09, 2003 5:22 PM
To: Michael Powell
Subject: indecency on television

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Dec. 11, 2003 12:39 PM
To: KAQuinn
Subject: Decency Laws

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television? Do you have small children who watch TV with you? Do you want them to grow up thinking all this "stuff" is normal, natural, and good for them? I hope not. I don't think it is good for my grandchildren and you are responsible for making sure it doesn't happen.

Like many families, we are tired of the constant sex, violence, homosexuality and profanity coming into our homes through the public airwaves. It has gotten so bad that even though we pay good money to have dish reception of TV and we have hundreds of channels to pick from, it is almost impossible to find a program that is both entertaining and suitable for a couple to watch together.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind ! of broadcast is going unchallenged by the FCC. And what was the purpose? I don't watch NYPD - never have willingly, but my husband enjoyed it and he is becoming

more and more disgusted with the trash portrayed there. You can make a difference.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Thank you for 'listening' to my complaints.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Jan. 17, 2005 6:33 PM
To: KAQuinn
Subject: Network Television

Dear FCC Commissioner,

Why do you continue to disregard your obligation to protect our citizenry from the constant barrage of indecency on television?

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionyouth.com, I respectfully implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Dec. 30, 2003 10:33 AM
To: Michael Powell
Subject: enforcement or dereliction?

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Jan. 07, 2004 11:12 PM
To: Michael Powell
Subject: moral values

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Feb. 17, 2004 9:03 AM
To: Michael Powell
Subject: DO something

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Dec. 11, 2003 9:04 AM
To: KAQuinn
Subject: tv programs

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Friday, Oct. 31, 2003 3:41 AM

To: Michael Powell

Subject: Stop the indecency, or we will stop the support!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Oct. 02, 2003 12:53 AM
To: Michael Powell
Subject: Clean Air

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Sunday, Aug. 17, 2003 7:59 PM
To: M Powell
Subject: Concerned Mom

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Sept. 10, 2003 11:45 AM
To: Michael Powell
Subject: Television

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families. we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It does not matter whether it was explicit or implicit. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Aug. 12, 2003 12:55 AM
To: M Powell
Subject: Start Doing Your Job!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again,

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Sept. 01, 2003 10:25 PM
To: Michael Powell
Subject: filthy network television

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, July 08, 2003 10:27 AM
To: M Powell
Subject: Why Are You Allowing Such Degredation

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves. I should not have to stand guard over what my children watch. The laws governing such indecency are very clear. Why does the FCC continue to turn their head away from these violations of the decency rules?

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Dec. 11, 2003 12:17 AM
To: KAQuinn
Subject: Television

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Apr. 22, 2005 3:42 PM
To: KAQuinn
Subject: Enforce Broadcast Indecency Laws

Dear FCC Commissioner,

Why do you continue to disregard your obligation to protect our citizenry from the constant barrage of indecency on television?

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionyouth.com, I respectfully implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Jan. 07, 2004 6:27 PM
To: Michael Powell
Subject: Unbelieveable

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Thursday, Sept. 25, 2003 5:44 PM

To: Michael Powell

Subject: FCC

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Sept. 19, 2003 12:47 PM
To: Michael Powell
Subject: Please enforce broadcast indecency laws!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From:	[REDACTED]
Sent:	Monday, Oct. 13, 2003 6:12 PM
To:	Michael Powell
Subject:	vigorously enforce broadcast indecency laws

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Sunday, Oct. 19, 2003 11:59 PM
To: Michael Powell
Subject: Action please!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Dec. 10, 2003 2:49 AM
To: KAQuinn
Subject: Do your appointed job!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Dec. 29, 2003 3:55 PM
To: Michael Powell
Subject: FCC negligence enforcing laws

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From:	[REDACTED]
Sent:	Wednesday, Oct. 01, 2003 11:25 PM
To:	Michael Powell
Subject:	disappointed

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Aug. 15, 2003 1:46 PM
To: M Powell
Subject: Indecent TV Programming

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, July 31, 2003 12:27 PM
To: M Powell
Subject: Do your job or resign!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Dec. 29, 2003 5:06 PM
To: Michael Powell
Subject: NYPD Blue - Boy exposed to Nudity

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Sept. 16, 2003 12:32 PM
To: Michael Powell
Subject: FCC Responsibility

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Dec. 17, 2003 10:43 PM
To: Michael Powell
Subject: programming

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Sunday, Aug. 17, 2003 4:04 AM
To: M Powell
Subject: Protect Our Children!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Jan. 01, 2004 3:11 PM
To: Michael Powell
Subject: Tired of poor programming

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, July 24, 2003 11:58 AM
To: M Powell
Subject: Appalling

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Oct. 01, 2003 11:57 AM
To: Michael Powell
Subject: Please Read

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Oct. 08, 2003 3:29 PM
To: Michael Powell
Subject: protect families

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Aug. 15, 2003 10:02 PM
To: M Powell
Subject: Indecency

Dear FCC Commissioner,

Why do you continue to disregard your obligation to protect our citizenry from the constant barrage of indecency on television?

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionyouth.com, I respectfully implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Sept. 17, 2003 12:54 PM
To: Michael Powell
Subject: Indecency Laws

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMiilionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again. Since you have the power to stop such programming, you are responsible for the damage that it causes if you allow it to take place.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Monday, June 9, 2003 10:26 AM

To: Commissioner Adelstein; Kathleen Abernathy; KM KJMWEB; Michael Copps; Mike Powell

Subject: indecent programming

Text item: Message Text

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Sunday, June 20, 2004 9:21 PM
To: Michael Powell
Subject: Deterioration of Network Programming

Dear FCC Commissioner,

Why do you continue to disregard your obligation to protect our citizenry from the constant barrage of indecency on television?

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionyouth.com, I respectfully implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Sunday, Feb. 13, 2005 3:04 PM
To: KAQuinn
Subject: FCC NYPD Blue Female Nude

Dear FCC Commissioner,

Why do you continue to disregard your obligation to protect our citizenry from the constant barrage of indecency on television?

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionyouth.com, I respectfully implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Dec. 19, 2003 12:22 AM
To: Michael Powell
Subject: Very Upset Vocal Citizen

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Oct. 10, 2003 4:15 AM
To: Michael Powell
Subject: Programming

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Dec. 10, 2003 11:50 AM
To: Michael Powell
Subject: Indecency on television

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Aug. 05, 2003 5:29 PM
To: M Powell
Subject: Enforce the laws

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

This great country was founded on Christian principles and you are throwing them in our faces. Please, let's make television family friendly again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, July 08, 2003 12:27 PM
To: M Powell
Subject: Your oversight of TV programming

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Nov. 04, 2003 9:50 PM
To: Michael Powell
Subject: Indecency on TV

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Wednesday, Oct. 01, 2003 11:46 PM
To: Michael Powell
Subject: Please do your job and HELP US!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Sept. 30, 2003 6:07 PM
To: Michael Powell
Subject: clean up our airways please

Dear FCC Commissioner:

I have contacted you in the past and helped spread the word that removing touched by an angel and more are not being removed. When I contacted your company, you urged me to please help keep you from getting all of these notices and bogging down your system. I did so ... Now please help America become a better place for our children.

You have the ability to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves. My family refuses to watch these types of things but we think it ridiculous that we even have to make this choice.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

I have just become a member of OneMillionMoms.com and I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Nov. 21, 2003 12:12 AM
To: Michael Powell
Subject: indecent

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Dec. 11, 2003 1:38 AM
To: KAQuinn
Subject: Do your job!!

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Oct. 17, 2003 2:53 PM
To: Michael Powell
Subject: Please Take Action

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Jan. 29, 2004 12:00 AM
To: Michael Powell
Subject: Let's Control Indecency

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Sunday, Aug. 17, 2003 8:10 PM
To: M Powell
Subject: NYPD Blue

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From:	[REDACTED]
Sent:	Thursday, Dec. 18, 2003 6:01 PM
To:	Michael Powell
Subject:	no f-word ever

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, Oct. 20, 2003 8:00 PM
To: Michael Powell
Subject: Protect our families

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full female. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Feb. 03, 2004 12:45 AM
To: KAQuinn
Subject: Hello

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Tuesday, Nov. 18, 2003 3:36 PM
To: Michael Powell
Subject: FCC indecency laws

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Dec. 11, 2003 3:51 PM
To: Michael Powell
Subject: protection of families

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Oct. 02, 2003 12:18 PM
To: Michael Powell
Subject: Stand for moral character

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionMoms.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, Sept. 18, 2003 2:38 PM
To: Michael Powell
Subject: Please Help American Families

Dear Commissioner Powell:

Please take seriously your obligation to protect our families from the constant barrage of indecency on television!

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, Nov. 21, 2003 7:48 PM
To: Michael Powell
Subject: FCC enforce decency laws please . . . . .

Dear FCC Commissioner:

Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?

Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.

On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.

As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Sincerely,

[REDACTED]

PETITIONER'S BRIEF

No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

JOSEPH R. PALMORE
Assistant to the Solicitor General

THOMAS M. BONDY
ANNE MURPHY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

AUSTIN C. SCHLICK
General Counsel

PETER KARANJIA
Deputy General Counsel

JACOB M. LEWIS
Associate General Counsel

NANDAN M. JOSHI
Counsel

Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

Respondents who were petitioners in the court of appeals in *Fox Televisions Stations* v. *FCC* (Pet. App. 1a-34a) are: Fox Television Stations, Inc., CBS Broadcasting Inc., WLS Television, Inc., KTRK Television, Inc., KMBC Hearst-Argyle Television, Inc., and ABC Inc.

Respondents who were intervenors in the court of appeals in *Fox Televisions Stations* v. *FCC* are: NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates, Center for the Creative Community, Inc., doing business as Center for Creative Voices in Media, Inc., and ABC Television Affiliates Association.

Respondents who were petitioners in the court of appeals in *ABC, Inc.* v. *FCC* (Pet. App. 118a-125a) are: ABC Inc., KTRK Television, Inc., WLS Television, Inc., Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television Inc., WSIL-TV, Inc., ABC Television Affiliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, Duhamel Broadcasting Enterprises, Gray Television License, Incorporated, KATC Communications, Incorporated, KATV LLC, KDNL Licensee LLC, KETV Hearst-Argyle Television Incorporated, KLTV/KTRE License Subsidiary LLC, KSTP-TV LLC, KSWO Television Company Incorporated, KTBS Incorporated, KTUL LLC, KVUE Television Incorporated, McGraw-Hill Broadcasting Company Incorporated, Media General Communications Holdings LLC, Mission

Broadcasting Incorporated, Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting Incorporated, NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television Inc., Piedmont Television of Huntsville License LLC, Piedmont Television of Springfield License LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations San Antonio Inc., Scripps Howard Broadcasting Co., Southern Broadcasting Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans Inc., WAPT Hearst-Argyle Television Inc., WDIO-TV LLC, WEAR Licensee LLC, WFAA-TV Inc., and WISN Hearst-Argyle Television Inc.

Respondents who were intervenors in the court of appeals in *ABC, Inc.* v. *FCC* are: Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., and CBS Broadcasting, Inc.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutes and regulations involved 2
Statement 2
Summary of argument 17
Argument 24
I. The Commission's indecency determinations are consistent with the Fifth Amendment 24
A. The court of appeals erred in finding the FCC's indecency enforcement policy unconstitutionally vague based on broadcasts not before the court .. 24
B. The FCC's indecency policy is not unconstitutionally vague as applied to the broadcasts at issue here 26
C. The FCC's indecency policy is not unconstitutionally vague on its face 33
II. The Commission's indecency determinations are consistent with the First Amendment 36
A. As applied to the broadcasts at issue in this case, the Commission's indecency enforcement policy is consistent with the First Amendment ... 36
B. Regulation of broadcast indecency does not violate the First Amendment 40
Conclusion 54

TABLE OF AUTHORITIES

Cases: Page

Action for Children's Television v. *FCC*:
852 F.2d 1332 (D.C. Cir. 1988) 6, 7, 8, 33, 40
932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992) 8
58 F.3d 654 (D.C. Cir. 1995), cert. denied, 516 U.S. 1043 (1996) 8, 39, 41, 47
Bethel Sch. Dist. No. 403 v. *Fraser*, 478 U.S. 675 (1986) 41
Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337 (1952) 26
CBS, Inc. v. *FCC*, 453 U.S. 367 (1981) 3, 43
Connally v. *General Constr. Co.*, 269 U.S. 385 (1926) 8
Dickerson v. *United States*, 530 U.S. 428 (2000) 52
Euclid v. *Amber Realty Co.*, 272 U.S. 365 (1926) 40
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) ..... *passim*
FCC v. *League of Women Voters*, 468 U.S. 364 (1984) ... 43
FCC v. *Pacifica Found.*, 438 U.S. 726 (1978) ..... *passim*
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 42
Fox Television Stations, Inc. v. *FCC*, 489 F.3d 444 (2d Cir. 2007), rev'd, 129 S. Ct. 1800 (2009) 12, 13, 30
Ginsberg v. New York, 390 U.S. 629 (1968) 5, 38, 39, 41
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 26
Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 24
Holder v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010) 18, 24, 25

Cases—Continued: Page

Infinity Broad. Corp., In re, 3 F.C.C.R. 930 (1987) 6, 7, 26, 35
Miller v. *California*, 413 U.S. 15 (1973) 51
National Broad. Co. v. *United States*, 319 U.S. 190 (1943) 2, 42
Nevada Comm'n on Ethics v. *Carrigan*, 131 S. Ct. 2343 (2011) 53
Pacifica Found. v. *FCC*, 556 F.2d 9 (D.C. Cir. 1977), rev'd, 438 U.S. 726 (1978) 27
Pacifica Found., Inc., In re, 2 F.C.C.R. 2698 (1987) 5
Parker v. *Levy*, 417 U.S. 733 (1974) 25
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 42
Reno v. *ACLU*, 521 U.S. 844 (1997) 36, 47, 53
Republican Party v. *White*, 536 U.S. 765 (2002) 53
Sable Commc'ns v. *FCC*, 492 U.S. 115 (1989) 41, 47
Smith v. *Gogeon*, 415 U.S. 566 (1974) 26
Turner Broad. Sys., Inc. v. *FCC*:
512 U.S. 622 (1994) 22, 42, 43, 46
520 U.S. 180 (1997) 49
United States v. *IBM Corp.*, 517 U.S. 843 (1996) 41, 47
United States v. *Williams*, 553 U.S. 285 (2008) 27
United States Civil Serv. Comm'n v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) 34
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 27
WPBN/WTOM License Subsidiary, Inc., In re, 15 F.C.C.R. 1838 (2000) 32
WUHY-FM, Eastern Educ. Radio, In re, 24 F.C.C. 2d 408 (1970) 27

Constitution, statutes and regulation: Page

U.S. Const.:
Amend. I ..... *passim*
Amend. V (Due Process Clause) 17, 25, 26, 33
Act of Aug. 13, 1912, ch. 287, 37 Stat. 302-303 2
Communications Act of 1934, ch. 652, 48 Stat. 1064, (47 U.S.C. 151 *et seq.*) 3
§ 326, 48 Stat. 1091 3
47 U.S.C. 301 3
47 U.S.C. 301-399b (2006 & Supp. III 2009) 3
47 U.S.C. 309(a) 3
47 U.S.C. 534 46
47 U.S.C. 534(b)(6) 46
47 U.S.C. 535 46
Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954 ..... 8, 27
Radio Act of 1927, ch. 169, 44 Stat. 1162 3
§ 29, 44 Stat. 1173 3
18 U.S.C. 1464 ..... 3, 4, 8, 27, 35
47 C.F.R. 73.3999(b) 8, 36

Miscellaneous:

Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, In re, 24 FCC Rcd 542 (2009) 44
Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc., In re, 26 F.C.C.R. 4238 (2011) 48
CBS Corp., *Our Portfolio*, http://www.cbscorporation.com/portfolio.php?division=101 48

Miscellaneous—Continued: Page

Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y., In re, 56 F.C.C. 2d 94 (1975) 4

Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, In re, 19 F.C.C.R. 4975 (2004) . 9, 10

Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan", In re, 20 F.C.C.R. 4507 (2005) 40

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Henry J. Kaiser Family Foundation, *Generation M2: Media in the Lives of 8- to 18-Year-Olds* (Jan. 2010), http://www.kff.org/entmedia/upload/8010.pdf .. 46

Implementation of the Child Safe Viewing Act, In re, 24 F.C.C.R. 11413 (2009) 46, 49, 51, 52

Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, In re, 16 F.C.C.R. 7999 (2001) 8, 9, 26, 31, 34

Miscellaneous—Continued: Page

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S. Rep. No. 268, 110th Cong., 2d Sess. (2008) 51

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The TV Parental Guidelines, http://www.tvguidelines.org 50

U.S. Census Bureau, *Statistical Abstract of the United States: 2011*, http://www/census.gov/compendia/statab 44

In the Supreme Court of the United States

No. 10-1293

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *Fox Television Stations, Inc.* v. *FCC* (Pet. App. 1a-34a) is reported at 613 F.3d 317. The order of the Federal Communications Commission under review in *Fox* (Pet. App. 35a-115a) is reported at 21 F.C.C.R. 13,299. The opinion of the court of appeals in *ABC, Inc.* v. *FCC* (Pet. App. 118a-125a) is not published in the *Federal Reporter* but is available at

404 Fed. Appx. 530. The order of the Federal Communications Commission under review in *ABC* (Pet. App. 126a-214a) is reported at 23 F.C.C.R. 3147.

JURISDICTION

The judgment of the court of appeals in *Fox* was entered on July 13, 2010. A petition for rehearing was denied on November 22, 2010 (Pet. App. 116a). On February 10, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *Fox* to and including March 22, 2011. On March 10, 2011, Justice Ginsburg further extended the time within which to file a petition for a writ of certiorari in *Fox* to and including April 21, 2011. The judgment of the court of appeals in *ABC* was entered on January 4, 2011. On March 25, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *ABC* to and including May 4, 2011. The petition for a writ of certiorari in both cases was filed on April 21, 2011, and was granted on June 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are set out in an appendix to the petition for a writ of certiorari. See Pet. App. 263a-267a.

STATEMENT

1. Since before the first broadcast stations appeared in 1921, federal law has provided that the radio spectrum may be used only with a federal license and only in compliance with federal regulatory requirements. See Act of Aug. 13, 1912, ch. 287, §§ 1-3, 37 Stat. 302-303; *National Broad. Co.* v. *United States*, 319 U.S. 190, 210-211 (1943). To better effectuate that policy, Congress adopted a

comprehensive regime of broadcast regulation in the Radio Act of 1927, ch. 169, 44 Stat. 1162, which it later incorporated in significant part into the Communications Act of 1934 (Communications Act), ch. 652, 48 Stat. 1064, 47 U.S.C. 151 *et seq.*; see 47 U.S.C. 301-399b (2006 & Supp. III 2009). This regulatory regime serves "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301; see Radio Act of 1927, § 1, 44 Stat. 1173 (same). Such licenses do not "create any right, beyond the terms, conditions, and periods of the license" itself. 47 U.S.C. 301.

Broadcast licenses are issued only to serve "the public interest, convenience, and necessity." 47 U.S.C. 309(a). Under this regime, a "licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009) (*Fox*) (quoting *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981)); see 47 U.S.C. 301 (prohibiting broadcasting "except under and in accordance with [the Communications Act] and with a license"). Since 1927, one of those "enforceable public obligations" (*Fox*, 129 S. Ct. at 1806) has been the prohibition on "utter[ing] any obscene, indecent, or profane language by means of radio communication." 18 U.S.C. 1464; see Radio Act of 1927, § 29, 44 Stat. 1173; Communications Act § 326, 48 Stat. 1091.

2. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*), the Court rejected a constitutional challenge to the FCC's exercise of its longstanding statu-

tory authority to regulate broadcast indecency. At issue in *Pacifica* was the midday radio broadcast of George Carlin's "Filthy Words" monologue, which discussed "the words you couldn't say on the public * * * airwaves, * * * the ones you definitely wouldn't say, ever." *Id.* at 729. Responding to a listener complaint, the Commission concluded that the Carlin monologue was "indecent" and that its broadcast therefore violated Section 1464. *Id.* at 732. In reaching that conclusion, the Commission applied a "concept of 'indecent' [that] is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 731-732 (quoting *In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y.*, 56 F.C.C. 2d 94, 98 (1975)); see *Fox*, 129 S. Ct. at 1806 (noting that the FCC's "definition of indecent speech" at issue in *Pacifica* is the same one the agency "uses to this day").

In rejecting a First Amendment challenge to the FCC's conclusion that broadcast of the Carlin monologue was indecent, the Court noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. The Court explained that "[t]he reasons for these distinctions are complex," but that two of them had particular relevance to that case. *Ibid.* First, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" because "material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the

First Amendment rights of an intruder." *Ibid.* (citation omitted); see *ibid.* ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."). Second, the Court observed that "broadcasting is uniquely accessible to children," and that broadcasts of indecent language can "enlarge[] a child's vocabulary in an instant." *Id.* at 749. Accordingly, the Court concluded that in this context "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." *Ibid.* (quoting *Ginsberg* v. *New York*, 390 U.S. 629, 639, 640 (1968)).

The Court in *Pacifica* emphasized that the constitutionality of the FCC's regulatory authority over indecent broadcasting rested on the agency's use of "a nuisance rationale under which context is all-important." 438 U.S. at 750. That "concept requires consideration of a host of variables," including the "time of day" and the "content of the program in which the language is used," which "will also affect the composition of the audience." *Ibid.* The Court explained that, under the agency's contextual approach, the words that rendered the Carlin monologue indecent might not support the same result if they appeared in "a telecast of an Elizabethan comedy." *Ibid.*

3. For several years after *Pacifica*, the Commission implemented an enforcement policy under which only "deliberate, repetitive use of the seven words actually contained in the George Carlin monologue" would be deemed actionably indecent. *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 12 (1987). That "approach permitted the unregulated broadcast of any material that did not contain Carlin's 'filthy words,' no matter how the

material might affect children exposed to it." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (*ACT I*) (R.B. Ginsburg, J.).

In 1987, the Commission reassessed its broadcast indecency enforcement policy in cases involving three different radio broadcasts. One was a morning broadcast by "shock jock" Howard Stern, which contained "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation, and testicles." *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 932 ¶ 20 (1987) (*Infinity Order*). Another was an evening airing of excerpted portions of a theatrical play that "contained the concentrated and repeated use of vulgar and shocking language to portray graphic and lewd depictions of excretion, anal intercourse, ejaculation, masturbation, and oral-genital sex." *Id.* at 932 ¶ 18. The third involved the evening broadcast of a song that contained "both lewd references to the male genitals and lewd descriptions of intercourse and oral-genital sex." *Id.* at 933 ¶ 22.

The Commission concluded that each of those broadcasts was indecent even though not all of them used the expletives included in the Carlin monologue. The Commission found that its post-*Pacifica* focus on "the repeated use, for shock value, of words similar to or identical to those satirized in the Carlin 'Filthy Words' monologue" was "unduly narrow as a matter of law and inconsistent with [its] enforcement responsibilities under Section 1464." *Infinity Order*, 3 F.C.C.R. at 930 ¶¶ 4-5. The Commission therefore announced that, in determining whether a particular broadcast was indecent, it would instead use the "generic definition of indecency" articulated in its 1975 *Pacifica* order. *Id.* at 930 ¶ 5. The Com-

mission further explained that, in applying that definition, it would consider, *inter alia*, whether the words or depictions used are "vulgar" or "shocking," whether the broadcast of such material is isolated, the character of the audience, and the merit of the program as it relates to the broadcast's patent offensiveness. *Id.* at 932 ¶ 16 (footnotes omitted). The Commission declined to develop a "comprehensive index or thesaurus of indecent words or pictorial depictions," explaining that it would be impossible "to construct a definitive list that would be both comprehensive and not over-inclusive in the abstract, without reference to the specific context." *Id.* at 932 ¶ 14.

In 1988, the D.C. Circuit upheld "the generic definition the FCC has determined to apply, case-by-case, in judging indecency complaints." *ACT I*, 852 F.2d at 1334. The parties challenging the FCC's policy in that case argued that the Commission had failed adequately to explain its decision to adopt that policy in place of its post-*Pacifica* focus on repetitive use of the words in the Carlin monologue. *Id.* at 1338. The court of appeals rejected that argument, stating that unless "*only* the seven dirty words are properly designated indecent[,] * * * some more expansive definition must be attempted," and "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Ibid.*

The D.C. Circuit also rejected the contention that the Commission's "indecency enforcement standard is facially invalid because unconstitutionally vague." *ACT I*, 852 F.2d at 1334; see *id.* at 1338-1339. The court observed that the "generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated" in *Pacifica*, and that this Court in *Pacifica* had held "the Carlin monologue indecent

within the meaning of section 1464." *Id.* at 1338-1339. The D.C. Circuit "infer[red]" from *Pacifica* that this Court "did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.* at 1338-1339 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)).

In a later portion of the same decision, the D.C. Circuit remanded the Commission's tentative determination that indecent material could be broadcast only after midnight, finding that the Commission had "failed to consider fairly and fully what time lines should be drawn." *ACT I*, 852 F.2d at 1341. The same court subsequently invalidated a congressional directive to enforce Section 1464 "on a 24 hour per day basis." *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1507 (D.C. Cir. 1991) (emphasis omitted), cert. denied, 503 U.S. 913 (1992) (*ACT II*). The D.C. Circuit later upheld a 10 p.m. to 6 a.m. statutory safe harbor for indecent broadcasts. See *Action for Children's Television* v. FCC, 58 F.3d 654, 656 (1995) (en banc), cert. denied, 516 U.S. 1043 (1996) (*ACT III*); Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954. The FCC's current regulations thus provide that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent." 47 C.F.R. 73.3999(b). There is no regulation of indecent material broadcast during the 10 p.m. to 6 a.m. safe harbor.

4. In 2001, the Commission issued a policy statement "to provide guidance * * * regarding [its] case law interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *In re Industry Guidance on the Commission's Case Law Interpreting*

18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 7999 ¶ 1 (2001) (*Industry Guidance*). That policy statement explained that "[i]ndecency findings involve at least two fundamental determinations." *Id.* at 8002 ¶ 7. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Ibid.* (citation omitted). Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8 (emphasis omitted).

The policy statement explained that the determination whether a broadcast is "patently offensive" depends on the "full context" in which the material is broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9 (emphasis omitted). The agency identified three "principal factors" that guide the analysis of patent offensiveness:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, [and] whether the material appears to have been presented for its shock value.

Id. at 8003 ¶ 10 (emphasis omitted).

5. In January 2003, the NBC network aired a live broadcast of the Golden Globe Awards. During the broadcast, the singer Bono stated, in accepting an award, "This is really, really f***ing brilliant. Really, really great." *In re Complaints Against Various Broad. Li-*

censees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4976 n.4 (2004) (*Golden Globe Awards Order*). The Commission concluded that the broadcast was indecent even though Bono's use of the F-Word was not "sustained or repeated." *Id.* at 4980 ¶ 12. The Commission acknowledged that it was departing from prior agency decisions holding that "isolated or fleeting use[s] of the 'F-Word' or a variant thereof in situations such as this [are] not indecent," and it made clear that such cases "are not good law to that extent." *Ibid.* Under its revised policy, the Commission explained, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.* Because the Commission's analysis reflected an acknowledged departure from its prior indecency enforcement policy, the FCC declined to impose any sanction. *Id.* at 4981-4982 ¶ 15.

6. The *Fox* case arises out of two broadcasts that aired before the Commission released the *Golden Globe Awards Order*. On December 9, 2002, Fox broadcast the 2002 Billboard Music Awards beginning at 8 p.m. Eastern Standard Time. The program was viewed by millions of children, including more than one million under age 11. Pet. App. 92a. During that broadcast, the entertainer Cher received an "Artist Achievement Award." In her acceptance speech, she stated: "I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em. I still have a job and they don't." *Id.* at 89a.

Approximately one year later, on December 10, 2003, Fox again broadcast the Billboard Music Awards, which

aired between 8 p.m. and 10 p.m. Eastern Standard Time. Like the 2002 broadcast, the program was viewed by millions of children. Pet. App. 50a. Nicole Richie and Paris Hilton, the stars of Fox's program "The Simple Life," presented one of the awards that night. During their presentation, they engaged in the following exchange:

Paris Hilton:	Now Nicole, remember, this is a live show, watch the bad language.
Nicole Richie:	Okay, God.
Paris Hilton:	It feels so good to be standing here tonight.
Nicole Richie:	Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple.

Id. at 42a-44a.

a. Following the two Billboard Music Awards broadcasts, the Commission received complaints from viewers, *e.g.*, J.A. 194-203, and the agency issued an order concluding that both broadcasts contained "indecent" language. J.A. 101-103, 105-110. As in the *Golden Globe Awards* case, the Commission did not impose any sanction because Fox had aired the relevant broadcasts before the Commission announced its revised policy regarding the airing of isolated expletives. J.A. 105, 112-113.

Fox and other broadcasters filed petitions for review, which were consolidated in the Second Circuit. The Commission obtained a voluntary remand from that

court to provide a further opportunity to consider the broadcasters' challenges to the Commission's order. The Commission subsequently vacated the relevant portions of the prior order and substituted the order under review in *Fox*. See Pet. App. 35a-115a. In that order, the Commission reaffirmed its conclusion that Fox's airing of the 2002 and 2003 Billboard Music Awards violated the prohibitions against the broadcast of indecent material before 10 p.m.

Applying the framework set out in its *Industry Guidance*, the Commission concluded that the expletives aired during both Billboard Music Awards broadcasts were sexual or excretory references that fell within the subject-matter scope of the Commission's indecency policy. Pet. App. 46a-48a, 90a-91a. The Commission further concluded that both broadcasts were "patently offensive." The Commission found that the language used was not only graphic and shocking, particularly in the context of nationally televised awards programs viewed by substantial numbers of children, but also gratuitous. In that regard, the Commission noted that Fox had not argued that the expletives at issue "had any artistic merit or were necessary to convey any message." *Id.* at 48a-49a & n.44, 91a-92a & n.191. The Commission adhered to its prior decision not to impose any sanction on Fox for the broadcasts. See *id.* at 85a-86a, 97a.

b. A divided panel of the court of appeals vacated the Commission's order and remanded the case to the agency for further proceedings. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444 (2d Cir. 2007), rev'd, 129 Ct. 1800 (2009). The court concluded that the Commission's change of policy regarding isolated expletives was "arbitrary and capricious under the Administrative Procedure

Act" because the agency had "failed to articulate a reasoned basis" for the shift. *Id.* at 447.

c. This Court reversed. Noting that "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission," *Fox*, 129 S. Ct. at 1813, the Court found that "the agency's reasons for expanding the scope of its enforcement activity were entirely rational," *id.* at 1812. The Court emphasized that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica*." *Ibid.* The Court explained that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Id.* at 1814. Because "[t]he Second Circuit did not definitively rule on the constitutionality of the Commission's orders," this Court "decline[d] to address the constitutional questions" and remanded the case to the court of appeals for further proceedings. *Id.* at 1819.

d. On remand, the court of appeals did not limit its inquiry to the constitutionality of the Commission's isolated-expletives policy as applied to Fox's broadcasts of the 2002 and 2003 Billboard Music Awards. Instead, the court held that the "FCC's indecency policy is unconstitutional" as a whole "because it is impermissibly vague." Pet. App. 18a. The court therefore "grant[ed] the petition for review and vacate[d]," not just "the FCC's order," but the entire "indecency policy underlying it." *Id.* at 2a.

The court of appeals understood "the FCC's current policy" to establish a "presumptive prohibition" on the use of the F- and S-Words unless their use is "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance," or the words are uttered in the course of a "bona fide news" program. Pet. App. 25a-26a (quoting J.A. 90). The court did not suggest that the broadcasts before it were news programs or that Fox had included the expletives in order to inform viewers or express an artistic message. The court nevertheless concluded that the FCC's policy is unconstitutionally vague because "broadcasters are left to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview.'" *Id.* at 27a.

The court of appeals recognized that the FCC had adopted a contextual approach to indecency, rather than a rigid rule prohibiting specified words, in part because "an outright ban on certain words would raise grave First Amendment concerns." Pet. App. 27a. The court also acknowledged that "[t]he English language is rife with creative ways of depicting sexual or excretory organs or activities," so that "even if the FCC were able to provide a complete list of all such expressions, new offensive and indecent words are invented every day." *Id.* at 24a. In the court's view, however, the "flexibility" of the FCC's contextual approach to indecency enforcement "results in a standard that even the FCC cannot articulate or apply consistently." *Id.* at 27a. On that basis, the court of appeals "str[uck] down the FCC's indecency policy" in its entirety. *Id.* at 34a.

6. The *ABC* case arises out of a February 25, 2003, broadcast, at 9:00 p.m. in the Central and Mountain time

zones, of an episode of the television show NYPD Blue entitled *Nude Awakening*.[1] The show opens with "a woman wearing a robe * * * entering a bathroom, closing the door, and then briefly looking at herself in a mirror hanging above a sink." Pet. App. 223a. "With her back to the camera," the woman "removes her robe, thereby revealing the side of one of her breasts and a full view of her back." *Ibid.* "The camera shot includes a full view of her buttocks and her upper legs as she leans across the sink to hang up her robe." *Ibid.* As she walks from the mirror to the shower, "a small portion of the side of one of her breasts is visible," and "her buttocks are visible from the side." *Ibid.*

The camera then shifts to show a young boy getting out of bed and walking toward the bathroom, at which point "[t]he camera cuts back to the woman, who is now shown standing naked in front of the shower, her back to the camera." Pet. App. 223a-224a. The camera first shows the woman "naked from the back, from the top of her head to her waist." *Id.* at 224a. "[T]he camera then pans down to a shot of her buttocks, lingers for a moment, and then pans up her back." *Ibid.* Next, the boy is shown opening the bathroom door. *Ibid.* As he does so, the woman "quickly turns to face" him. *Ibid.* "The camera initially focuses on the woman's face but then cuts to a shot taken from behind and through her legs, which serve to frame the boy's face as he looks at her." *Ibid.*

The camera immediately shifts to "a front view of the woman's upper torso," although a "full view of her breasts is obscured * * * by a silhouette of the boy's

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[1] A recording of this episode, which was part of the record before the court of appeals, has been filed with the Clerk.

head and ears." Pet. App. 224a. "After the boy backs out of the bathroom and shuts the door," the woman is shown "facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area." *Ibid.* "The scene ends with the boy's voice, heard through the closed door, saying 'sorry,'" to which "the woman while looking embarrassed, responds, 'It's okay. No problem.'" *Ibid.*

a. After receiving viewer complaints and issuing a notice of apparent liability regarding the program, the FCC imposed an indecency forfeiture of $27,500 on each of several ABC network-owned stations or affiliates. Pet. App. 126a-214a. Applying the framework set out in its *Industry Guidance*, including the longstanding agency definition of indecency that this Court approved in *Pacifica*, the Commission first concluded that the depiction of an adult woman's naked buttocks in the episode constituted a depiction of sexual or excretory organs and thus fell within the subject-matter scope of the Commission's indecency policy. *Id.* at 132a-137a.

The Commission then determined that "in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium." Pet. App. 138a. In explaining that determination, the Commission observed that the episode contained a "close range," "fully visible" view of the actress's unclothed buttocks that was "sufficiently graphic and explicit to support an indecency finding." *Id.* at 140a. The Commission further explained that camera shots of the woman's buttocks were "repeated" within the scene, which "focuses on her nudity." *Id.* at 142a. Finally, the Commission determined that the scene was "pandering, titillating, and shocking." *Id.* at 143a. The FCC explained that the scene placed the

audience in the "voyeuristic position" of observing a naked woman preparing to shower, and that the manner in which the scene was shot "highlights the salacious aspect of the scene." *Id.* at 143a-144a. The Commission also found that "subsequent camera shots of the boy's shocked face from between the woman's legs, and of her naked, partially-obscured upper torso from behind his head," contributed to the scene's "titillating and shocking nature." *Id.* at 144a.

b. ABC and its affiliates sought review of the *Forfeiture Order* in the Second Circuit. After denying the government's rehearing petition in *Fox*, the court of appeals issued a summary order in *ABC* vacating the Commission's order. The court concluded that "there is no significant distinction between this case and *Fox*" because "[a]lthough this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found 'impermissibly vague.'" Pet. App. 124a (citation omitted). As in *Fox*, the court of appeals did not address the question whether, on the facts of the case, the broadcaster had constitutionally sufficient notice that the relevant material could be considered indecent.

SUMMARY OF ARGUMENT

The FCC's indecency enforcement policies are consistent with the Fifth and First Amendments, both as applied to the broadcasts at issue here and on their face.

1. a. In addressing respondents' vagueness challenges, the court of appeals never asked what should have been the dispositive question: whether Fox and ABC had fair notice that the expletives and nudity in the broadcasts under review could violate the Commission's indecency standards. Instead, the court in *Fox* invali-

dated the FCC's policy in its entirety, based on the policy's application to broadcasts not before the court and on perceived inconsistencies between those applications. The court in *ABC* likewise did not consider the particular broadcast at issue but relied solely on the prior decision in *Fox*. That approach was incorrect. Even in adjudicating First Amendment challenges, courts must "consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2718-2719 (2010) (internal citation omitted and brackets in original) (*HLP*).

b. Any as-applied vagueness challenge regarding the particular broadcasts here would fail. Fox could not reasonably have believed that the concededly gratuitous broadcast of the F-Word and the S-Word, during primetime awards shows with millions of children in the audience, would not be considered indecent. Those words have long been a focus of the FCC's indecency enforcement efforts, and they featured prominently in the Carlin monologue itself. The networks' own internal standards generally prohibit broadcast of those words, and Fox edited them out of the relevant awards-show broadcasts when they aired on tape delay in later time zones. In finding the FCC's enforcement standards to be unconstitutionally vague, the court of appeals relied on FCC indecency orders involving news, public affairs programming, or artistic necessity. Those orders did not create any meaningful uncertainty as to the legal status of Fox's own broadcasts, however, because there is no reasonable argument that Fox's awards-show broadcasts fell into any of those categories.

ABC likewise had constitutionally sufficient notice that its broadcast of adult nudity in the NYPD Blue episode would be considered indecent. As the Court explained in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), the Commission long ago warned broadcasters that "the televising of nudes might well raise a serious question of" unlawful indecency, even if the images lack "prurient appeal." *Id.* at 741 & n.16 (quoting *Enbanc Programing Inquiry*, 44 FCC 2303, 2307 (1960)). Although the FCC has not categorically treated all images of nudity as indecent, the "voyeuristic" (Pet. App. 143a) images contained in ABC's broadcast cannot reasonably be analogized (as ABC suggests) to a scene involving nude concentration camp prisoners in a broadcast of the film "Schindler's List."

c. Even if the court of appeals had been authorized to conduct what amounted to facial vagueness review, the court erred in finding the FCC's indecency enforcement regime to be unconstitutionally vague. In carrying out its statutory duty to enforce the prohibition on the broadcast of indecent material, the Commission employs a definition of indecency—and a contextual approach to applying it—that this Court upheld in *Pacifica*.

The Commission has provided further guidance to broadcasters as to the types of material that may be found indecent, not only through specific rulings in particular cases, but in a comprehensive policy statement issued in 2001. The FCC enforces its broadcast indecency regulation only against broadcast licensees, who are highly sophisticated entities that operate in a heavily regulated market. Those licensees can reasonably be expected both to pay particular attention to the agency's explication of its indecency standard and to be familiar with "contemporary community standards *for the broad-*

cast medium." *Pacifica*, 438 U.S. at 732 (emphasis added). Indeed, the major networks have personnel and internal rules dedicated to compliance with those standards.

Broadcasters that nonetheless remain uncertain about whether particular material is indecent are free to air it during the regulatory safe harbor after 10 p.m. Further mitigating any vagueness concerns, the Commission has consistently declined to impose penalties in cases in which a broadcaster lacked fair notice that the Commission's indecency policy might apply.

Although the FCC could in theory respond to the court of appeals' vagueness holdings by compiling a list of categorically prohibited words or images, such an approach would be inconsistent with the contextual analysis of indecency that the Commission has long applied and that this Court "sanctioned in *Pacifica*." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009). Abandoning consideration of context would be both over- and under-inclusive, since it would require sanctioning even those broadcasts that are unlikely to attract child viewers, while permitting broadcasts of grossly offensive material that avoids the listed words and images.

2. The FCC indecency determinations at issue here are consistent with the First Amendment principles announced in *Pacifica*, and there is no basis for overruling that decision.

a. Although Fox's broadcasts did not involve repetition of offensive language to the degree present in *Pacifica*, this Court "ha[s] never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815. A single expletive uttered by a celebrity during an awards show can "enlarge[] a child's vocabu-

lary in an instant," *Pacifica*, 438 U.S. at 749, and "[p]rogramming replete with one-word indecent expletives will tend to produce children who use (at least) one word indecent expletives." *Fox*, 129 S. Ct. at 1813. The First Amendment does not prevent the government from safeguarding against that outcome in furtherance of its compelling interest in protecting children.

The First Amendment likewise does not bar application of the FCC's indecency policy to ABC's broadcast of adult nudity. Contrary to ABC's contention, the Constitution does not provide blanket immunity for broadcast nudity that is not "highly sexualized" or that appears on screen for only seven seconds. ABC Br. in Opp. 27. Nor does the First Amendment require the FCC to present scientific evidence of harm from such material. "The Commission had adduced no quantifiable measure of the harm caused by the language in *Pacifica*, and [this Court] nonetheless held that the 'government's interest in the well-being of its youth . . . justified the regulation of otherwise protected expression.'" *Fox*, 129 S. Ct. at 1813 (quoting *Pacifica*, 438 U.S. at 749) (some internal quotation marks omitted).

b. Respondents have identified no sound basis for overruling this Court's decision in *Pacifica*. Both with respect to indecent speech and more generally, this Court has long applied less demanding First Amendment scrutiny to regulation of broadcast speech than to regulation of other communications media. That established rule has historically been premised on the scarcity of available broadcast frequencies, the pervasive presence of broadcast media, and the unique accessibility of broadcast programming to children. Those characteristics of broadcasting remain true today.

Because of "the unique physical limitations of the broadcast medium," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) (*Turner I*), the number of would-be broadcasters has long exceeded the number of available frequencies. Federal allocation of specific frequencies along the spectrum therefore has been essential to effective broadcast communication. A broadcast license thus carries with it substantial benefits that would not be available in a wholly unregulated market, and the licensee's acceptance of those benefits has historically carried with it an enforceable obligation to operate the franchise in a manner that serves the public interest. Despite the intervening technological developments that respondents identify, there continue to be more would-be broadcasters than available frequencies.

Even with the rise of alternative transmission platforms like cable, broadcast programming maintains a dominant presence in American life and culture. Millions of households in which television sets are present do not subscribe to cable or satellite services and therefore receive only broadcast programming. Broadcast programming also remains uniquely accessible to children, in part because its availability to children does not depend on any affirmative conduct by parents (such as subscription to a particular cable channel) beyond the initial acquisition of a television or radio.

The expansion of alternate transmission platforms does not render the FCC's broadcast-indecency regime obsolete. To the contrary, the current availability of a great range of programming alternatives mitigates any First Amendment concerns regarding broadcast regulation, since both viewing adults and content creators have a greater range of opportunities (as compared to those

that existed when *Pacifica* was decided) to access and convey programming that is not appropriate for children.

The "V-Chip" is not an effective substitute for the FCC's indecency-enforcement rules, and its existence does not undermine *Pacifica*. The V-Chip does not work with radio broadcasts at all, and the television ratings on which it depends are frequently inaccurate. Indeed, with respect to the particular broadcasts at issue in this case, the V-Chip would not have assisted parents because the ratings for the programs did not reflect the content that the FCC found indecent.

The Commission's indecency-enforcement rules remain a reasonable and constitutional implementation of the government's compelling interest in protecting children from harmful exposure to sexual or excretory words and images. Generations of parents have relied on indecency regulation to safeguard broadcast television as a relatively safe medium for their children. The rise of alternative communications media has strengthened, not undermined, that reliance interest.

Broadcasters have no substantial countervailing reliance interest. Regulation of indecent material has been a defining feature of broadcasting since the medium's very inception, and it is one of the enforceable public obligations that broadcasters accept in return for their free use of the public's airwaves. *Fox*, 129 S. Ct. at 1806. And under the Commission's rules, broadcasters are not entirely disabled from broadcasting indecent material, but are simply required to channel it to the hours (after 10 p.m.) when it is unlikely to reach large numbers of children. That measured approach to indecency enforcement strikes a reasonable balance between the government's compelling interest in protecting children and the speech rights of adults.

ARGUMENT

I. THE COMMISSION'S INDECENCY DETERMINATIONS ARE CONSISTENT WITH THE FIFTH AMENDMENT

This case involves challenges to two FCC adjudicatory orders finding three particular broadcasts indecent. Rather than determining whether those specific indecency findings were constitutionally infirm, however, the court of appeals struck down the FCC's "indecency policy" in its entirety, based on the assertedly inconsistent manner in which that policy had been applied to *other* broadcasts. Pet. App. 2a, 34a. In taking that approach, the court of appeals disregarded this Court's repeated admonitions that vagueness analysis should focus on the facts of the case at hand. In any event, the court of appeals erred in finding that the FCC's indecency policy is facially vague.

A. The Court Of Appeals Erred In Finding The FCC's Indecency Enforcement Policy Unconstitutionally Vague Based On Broadcasts Not Before The Court

As this Court recently emphasized, a court confronted with a vagueness challenge should "consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2718-2719 (2010) (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). "That rule makes no exception for conduct in the form of speech." *Id.* at 2719. Accordingly, "even to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amend-

ment for lack of notice." *Ibid.*; see *Parker* v. *Levy*, 417 U.S. 733, 755-757 (1974).

With respect to respondents' vagueness challenges, the only question properly before the court of appeals therefore was whether the particular broadcasts at issue—the 2002 and 2003 Billboard Music Awards and the *Nude Awakening* episode of NYPD Blue—were "clearly proscribed" by the FCC's indecency policy. *HLP*, 130 S. Ct. at 2719. The court of appeals simply ignored that controlling question.[2] Instead, like the Ninth Circuit in *HLP*, the court in effect applied overbreadth analysis to petitioners' Fifth Amendment vagueness challenge by "consider[ing] the [FCC policy's] application to facts not before it." *Ibid.*; see pp. 28-30, *infra* (discussing court of appeals' comparisons among various orders other than the ones under review). The court of appeals never explained how other Commission orders (all of which were issued *after* the broadcasts in this case) could have deprived Fox of notice that the gratuitous use of the F-Word and S-Word on its prime-time awards show broadcasts would be considered indecent. The court of appeals in *ABC* likewise did not "consider whether" the FCC's policy was "vague as applied to the particular facts at issue," 130 S. Ct. at 2718-2719, namely the scripted adult nudity in the opening scene of *Nude Awakening*. Instead, the *ABC* court vacated the Commission's indecency sanction based solely on its antecedent holding of facial vagueness in *Fox*. Pet. App. 120a.

By "strik[ing] down the FCC's indecency policy" in its entirety, Pet. App. 34a, the court precluded the policy's

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[2] The court of appeals' only response to the government's reliance on *HLP* was the unelaborated statement that the case was "inapposite" because of its "entirely different procedural posture." Pet. App. 30a n.9.

application not only to the broadcasts at issue here, but also to a hypothetical rebroadcast of the Carlin monologue itself, and to the most graphic and explicit material that has come before the Commission, see, *e.g.*, *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8004 ¶ 13 (2001) (graphic discussion of oral sex), 8009 ¶ 19 (explicit joke about rape of a baby); *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 934 (1987) (extended narrative regarding anal sex). Judicial review of the particular adjudicatory orders before the court of appeals should not have produced that sweeping result.

B. The FCC's Indecency Policy Is Not Unconstitutionally Vague As Applied To The Broadcasts At Issue Here

1. The Fifth Amendment's Due Process Clause requires that laws be crafted with sufficient clarity to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and to "provide explicit standards for those who apply them." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). "Condemned to the use of words," however, "we can never expect mathematical certainty from our language." *Id.* at 110. "[M]ost statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell our prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952). Moreover, "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." *Smith* v.

Gognen, 415 U.S. 566, 581 (1974). Thus, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States* v. *Williams*, 553 U.S. 285, 304 (2008) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)). And "the mere fact that close cases can be envisioned" does not "render[] a statute vague." *Id.* at 305.

In prohibiting the broadcast of "obscene, indecent, or profane language," 18 U.S.C. 1464, and in directing the FCC to "promulgate regulations to prohibit the broadcasting of indecent programming" during specified hours of the day, Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954, Congress recognized that a wide variety of material, not easily specified in advance, could transgress the reasonable standards of behavior applicable to the broadcast industry. The Commission's indecency-enforcement regime therefore appropriately reflects the recognition that a "concept like 'indecent' is not verifiable as a concept of hard science." *Pacifica Found.* v. *FCC*, 556 F.2d 9, 33 (D.C. Cir. 1977) (Leventhal, J., dissenting), rev'd, 438 U.S. 726 (1978).

2. The FCC's established enforcement practices would have given a reasonable broadcaster in Fox's position fair warning that gratuitous use of the F-Word and the S-Word during a nationally televised prime-time awards show with millions of children in the audience could be considered indecent. The Commission has long imposed sanctions on the broadcast of precisely such language. See, e.g., *In re WUHY-FM, Eastern Educ. Radio*, 24 F.C.C. 2d 408, 415 ¶ 17 (1970). Indeed, the F-Word and the S-Word are two of the most prominent examples of expletives in the Carlin monologue found

indecent in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). See *id.* at 751-755.[3]

The networks' internal standards, which apply even during hours of the day when the FCC's indecency regulation does not, recognize that "airing the 'F-Word' and the 'S-Word' on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium." Pet. App. 61a. And when the awards shows at issue in this case were broadcast on tape delay to later time zones, Fox blocked the expletives in question. *Id.* at 61a, 94a. That action concretely demonstrated Fox's awareness that broadcast of the expletives in this context was inconsistent with contemporary community standards for the broadcast medium.

None of the purported inconsistencies between other FCC indecency adjudications discussed in the court of appeals' opinion would have deprived Fox of fair notice that the language at issue in this case could be considered indecent. Fox could not have relied on any of these orders because they all came after Fox's 2002 and 2003 broadcasts. In any event, none of those orders is inconsistent with the FCC's indecency determination with respect to Fox's awards-show broadcasts.

The court of appeals found it problematic that the FCC had "concluded that 'bulls***' in a 'NYPD Blue' episode was patently offensive" but that "dick," "dickhead," "pissed off," "up yours," "kiss my ass," and "wiping his ass" were not. Pet. App. 23a-24a. In making that

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[3] To be sure, Fox did not have reasonable notice at the time of the broadcasts that the Commission would consider non-repeated expletives indecent. Respondents cannot establish unconstitutional vagueness on that basis, however, because the Commission did not impose a sanction where Fox lacked such notice. See p. 31, *infra*.

distinction, the Commission reasonably assessed the graphic nature and social acceptability of these words. J.A. 115-116, 153-154. More to the point, the Commission's conclusion that "bulls***" was indecent but that other arguably offensive words were not would not have deprived Fox of notice that the word "cows***" would be considered indecent. To the contrary, the Commission has made clear that the word "s***" and its variants are sufficiently graphic to support an indecency finding, even though other offensive words may not be. Moreover, the court of appeals' comparison says nothing about the "F-Word," which appeared in both Fox broadcasts and is widely recognized as "one of the most vulgar, graphic, and explicit words for sexual activity in the English language." Pet. App. 48a.

The court of appeals also perceived that the Commission had acted inconsistently by, on the one hand, finding a broadcast of the film "Saving Private Ryan" not indecent because the expletives it included were "integral to the 'realism and immediacy of the film experience for viewers'" while, on the other hand, reaching a different conclusion with respect to a documentary on blues musicians. Pet. App. 29a (citation omitted). Any perceived inconsistency in application of what the court of appeals described as an "artistic necessity" exception, *id.* at 27a, however, has no relevance to any as-applied vagueness challenge that Fox could plausibly assert here. Fox has never claimed that it broadcast the expletives at issue because of artistic necessity or that they were integral to a message it wanted to convey. To the contrary, Fox edited the expletives out of the broadcasts in later time zones the same evening. *Id.* at 61a.

The court of appeals also perceived an inconsistency between the FCC's determination that "multiple occur-

rences of expletives in 'Saving Private Ryan' was not gratuitous" and the agency's conclusion that "a single occurrence of 'f***ing' in the Golden Globes Awards was 'shocking and gratuitous.'" Pet. App. 26a (quoting *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 463 (2d Cir. 2007), rev'd, 129 S. Ct. 1800 (2009)). The court had made precisely the same criticism in its first decision in this case, and this Court explained why the court of appeals was wrong. The FCC's context-based approach

> could support the Commission's finding that a broadcast of the film Saving Private Ryan was not indecent —a finding to which the broadcasters point as supposed evidence of the Commission's inconsistency. The frightening suspense and the graphic violence in the movie could well dissuade the most vulnerable from watching and would put parents on notice of potentially objectionable material.

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1814 (2009). The Court observed that there was no inconsistency between a judgment finding such a broadcast not indecent and a contrary conclusion regarding "the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Ibid.*

The court of appeals also criticized the Commission's approach to "news and public affairs programming," where the FCC has recognized the "need for caution" in regulating indecent material but has not adopted an "outright news exception" to its indecency-enforcement regime. Pet. App. 27a, 32a.[4] Any uncertainty regarding

[4] The Commission has concluded that a categorical "news" exception is unwarranted because it might permit broadcast of explicit and vulgar

the application of FCC indecency standards to news programs is irrelevant to the proper disposition of this case. Despite Fox's current assertion that the matter is "unclear" (Br. in Opp. 24), there is no serious argument that the live broadcast of a Billboard Music award for "Top 40 Mainstream Track" by Nicole Richie and Paris Hilton (Pet. App. 43a-44a) was "news" or "public affairs programming." In any event, Fox did not make that claim before the Commission or the court of appeals, and it has therefore been waived.

Finally, the Commission has provided additional protection against unfair surprise by declining to sanction broadcasters in cases where it was not clear at the time of the broadcast that the FCC would regard the pertinent material as indecent. See, *e.g.*, Pet. App. 95a (declining to impose penalty on Fox for the 2002 Billboard Music Awards broadcast aired before the Commission had abandoned its previous policy exempting isolated expletives from the prohibitions on indecent broadcasts). That policy of forbearance "precludes any argument that [the Commission] is arbitrarily punishing parties without notice of the potential consequences of their action." *Fox*, 129 S. Ct. at 1813.

3. ABC likewise had sufficient notice that its broadcast of the nude adult images in the *Nude Awakening* episode of NYPD Blue might violate the FCC's indecency standards. More than 50 years ago, the Commis-

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material during times when children are likely to be in the audience, so long as there is some arguable basis for connecting the material to a news or public affairs issue. See, *e.g.*, *Industry Guidance*, 16 F.C.C.R. at 8013 ¶ 22 (graphic description "of the alleged rape of Jessica Hahn by the Rev. Jim Bakker" was indecent even though it "concerned an incident that was at the time 'in the news'") (internal quotation marks omitted).

sion warned broadcasters that, although "a nudist magazine may be within the protection of the First Amendment," the "televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464." *Enbanc Programing Inquiry*, 44 FCC 2303, 2307 (1960). This Court's decision in *Pacifica* reinforced that warning. The Court there held that "prurient appeal" was not a prerequisite to a finding of indecency, and it quoted the FCC's prior reference to the "televising of nudes" as an example of material that could be indecent even though it lacked "prurient appeal." *Pacifica*, 438 U.S. at 741 & n.16.

ABC also complains that it had insufficient notice because the Commission had previously "rejected indecency complaints involving much longer displays of nudity, including full frontal nudity." Br. in Opp. 20. But the only published Commission order it cites in support of that proposition, *In re WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838 (2000), involved a scene from the film "Schindler's List" in which "concentration [camp] prisoners [were] 'made to run around the camp fully nude as the sick are sorted from the healthy.'" Pet. App. 145a (internal citation omitted). As the Commission explained, although that scene was "certainly disturbing," it was "neither pandering nor titillating." *Ibid.* ABC could not reasonably have believed that the Commission's determination regarding *Schindler's List* dictated a like finding with respect to the opening scene of *Nude Awakening*, in which "[t]he viewer is placed in the voyeuristic position of viewing an attractive woman disrobing as she prepares to step into the shower." *Id.* at 143a, 145a.

C. The FCC's Indecency Policy Is Not Unconstitutionally Vague On Its Face

Even if it had been appropriate for the court of appeals to conduct facial vagueness review of the FCC's overall indecency policy, the court erred in its disposition of respondents' Fifth Amendment challenges.

1. The FCC's generic definition of indecency—"language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," *Pacifica*, 438 U.S. at 732 (citation omitted)—was before this Court in *Pacifica* and is the same one the FCC "uses to this day," *Fox*, 129 S. Ct. at 1806. Based on that generic definition, this Court in *Pacifica* found "no basis for disagreeing with the Commission's conclusion that indecent language was used in" the Carlin monologue. 438 U.S. at 741. It is thus clear that "the Court [in *Pacifica*] did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (R.B. Ginsburg, J.) (citation omitted). During the ensuing years, the agency has provided additional guidance that further clarifies the standard. In the 2001 *Industry Guidance*, for example, the Commission comprehensively described its approach to indecency enforcement, see pp. 8-9, *supra*, and the FCC has further elaborated on its standard in a number of reported decisions involving individual adjudications. See, *e.g.*, *In re Complaints By Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1931 (2005).

In rejecting vagueness challenges in other contexts, this Court has relied on "the longstanding interpretations of [a] statute by the agency charged with its interpretation and enforcement." *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 575 (1973). Such reliance is particularly appropriate here. The FCC's broadcast indecency policy is not enforced against members of the general public, but rather applies only to broadcast licensees, who are highly sophisticated participants in a heavily regulated industry. And the Commission proscribes only material that is inconsistent with "contemporary community standards *for the broadcast medium*." *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8 (emphasis added). The parties who are regulated by the FCC's indecency regime thus have particular expertise and experience in applying to their own broadcasts the standards the FCC applies in its enforcement capacity.

Indeed, the major networks have dedicated personnel and policies to ensure compliance with those community standards for the broadcast medium. In this case, the Commission canvassed the networks' own practices during the 10 p.m. to 6 a.m. safe harbor (when the FCC's indecency regulation does not apply) and found that, "with rare exceptions, [the networks] do not allow the 'F-Word' or the 'S-Word' to be broadcast during that time period." Pet. App. 60a. The Commission reasonably determined that "broadcasters' practices with respect to programming aired during the safe harbor reflect their recognition that airing the 'F-Word' and the 'S-Word' on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium." *Id.* at 61a.

2. Theoretically, the FCC could provide broadcast licensees with even greater clarity by promulgating an exhaustive list of words or images that are prohibited regardless of context. As the court of appeals recognized, however, such "an outright ban on certain words would raise grave First Amendment concerns." Pet. App. 27a. That rigid approach would also be inconsistent with *Pacifica*, where the Court emphasized with approval the Commission's reliance on "a nuisance rationale under which context is all-important" and under which "a host of variables" must be considered. 438 U.S. at 750.

An inflexible approach to indecency enforcement, relying solely on the presence or absence of particular disfavored words, would be significantly under-inclusive as well. In particular, it would undermine effective enforcement of Section 1464 by permitting broadcast of material that is highly offensive but does not include the prohibited words. See *Infinity Order*, 3 F.C.C.R. at 932 ¶ 14. The Commission in 1987 explained that such a rigid policy was not viable, and the soundness of that conclusion is confirmed by the graphic nature of material before the Commission that did not include any of Carlin's expletives. See *id.* at 934-935.

3. Two additional factors reinforce the conclusion that the FCC's indecency standards are not unconstitutionally vague. First, many if not most of the broadcasts that are close to the indecency line are likely to be contrary to the networks' own standards, and in any event are far removed from typical broadcast fare. See p. 34, *supra*; cf. *Fox*, 129 S. Ct. at 1819 (explaining that, to the extent "the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution, * * * [such]

chilled references to excretory and sexual material 'surely lie at the periphery of First Amendment concern'" (quoting *Pacifica*, 438 U.S. at 743 (plurality op.)). Second, a broadcaster who is uncertain whether particular material is indecent can avoid any danger of liability by airing the material after 10 p.m. See *Reno* v. *ACLU*, 521 U.S. 844, 867 (1997) (explaining that the Commission's regulatory scheme "designates when—rather than whether—it would be permissible to air" indecent material); 47 C.F.R. 73.3999(b). For both those reasons, the unavoidable lack of complete precision in the FCC's definition of indecency is unlikely to foreclose a substantial amount of broadcast speech.

II. THE COMMISSION'S INDECENCY DETERMINATIONS ARE CONSISTENT WITH THE FIRST AMENDMENT

Application of the FCC's indecency policy to the three broadcasts at issue in this case is consistent with the First Amendment principles articulated by this Court in *Pacifica*. The Court should decline respondents' invitation to overrule that case. Given the unique nature of both broadcasting and the regime of broadcast licensing, the FCC's regulation channeling broadcast indecency to the hours after 10 p.m. is consistent with the First Amendment.

A. As Applied To The Broadcasts At Issue In This Case, The Commission's Indecency Enforcement Policy Is Consistent With The First Amendment

1. The First Amendment did not prohibit the FCC from concluding that the prime-time airing of the F-Word and S-Word during Fox's Billboard Music Awards broadcasts—"shows that were expected to (and did) draw the attention of millions of children," *Fox*, 129 S. Ct. at 1814—was indecent. The authority of Congress

and the FCC to regulate broadcast indecency is not limited to indecent speech that "rises to the level of 'verbal shock treatment,' exemplified by the Carlin monologue." Pet. App. 17a. Although Fox's broadcasts did not involve the repeated use of offensive language that occurred in *Pacifica*, this Court "ha[s] never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815.

This Court's First Amendment precedents do not suggest that a constitutional line exists between indecent language that is brief and indecent language that is not. Granting "complete immunity for fleeting expletives," *Fox*, 129 S. Ct. at 1814, "would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time," Pet. App. 58a. But even an isolated use of an offensive word can "enlarge[] a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 479. In this case, "it suffices to know that children mimic the behavior they observe—at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." *Fox*, 129 S. Ct. at 1813.

2. Applying a variation of Fox's "fleeting expletives" argument to its broadcast of adult nudity, ABC contends (Br. in Opp. 27) that "the First Amendment simply does not allow the government to proscribe a seven-second non-sexual display of a woman's buttocks like the one at issue here." In particular, ABC argues that its prime-time broadcast of NYPD Blue is constitutionally immune from the FCC's indecency-enforcement regime because the nudity in that broadcast was not "highly sexualized"

and was displayed for "only seven seconds." *Id.* at 27, 29.

The Court held in *Pacifica*, however, that the doctrine of constitutional avoidance did not require inclusion of "prurient appeal" as a component of indecency. 438 U.S. at 740-741 & n.17. The Court upheld the Commission's indecency determination with respect to the Carlin monologue, which can hardly be described as "highly sexualized." The Court also noted, with apparent approval, the Commission's longstanding view that "the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464." *Id.* at 741 n.16 (quoting *Enbanc Programing Inquiry*, 44 FCC at 2307).

As the Commission observed, the NYPD Blue episode "contain[s] more shots or lengthier depictions of nudity, or more focus on nudity, than other cases involving nudity" that the agency has adjudicated. Pet. App. 143a. Moreover, the nudity was repeated and was not fleeting—it extended over several seconds and was the centerpiece of the opening scene of the *Nude Awakening* episode. *Id.* at 180a. ABC's argument logically suggests that broadcasters have a First Amendment right to air entirely gratuitous full frontal nudity, provided that they do so in intermittent bursts of fewer than seven seconds. Nothing in this Court's precedents supports that result.

ABC is likewise wrong in arguing that the nudity in NYPD Blue is beyond the reach of the FCC's enforcement authority because it does not "genuinely" have the "capacity" to harm children. Br. in Opp. 27. In upholding regulation of indecent material in the interest of protecting children, this Court has not required "scientific" proof that dissemination of the materials to minors would actually have the feared effect. *Ginsberg* v. *New York*, 390 U.S. 629, 641 (1968); see *id.* at 641-643. As this Court

explained in *Fox*, "[t]he Commission had adduced no quantifiable measure of the harm caused by the language in *Pacifica*, and [this Court] nonetheless held that the 'government's interest in the "well-being of its youth" . . . justified the regulation of otherwise protected expression.'" 129 S. Ct. at 1813 (quoting *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg*, 390 U.S. at 639, 640)); see also *Action for Children's Television* v. *FCC*, 58 F.3d 654, 661-662 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996) ("[T]he Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.").

ABC further contends that nudity is harmless to children because "[e]very child has seen buttocks (presumably for longer than seven seconds)." Br. in Opp. 29. The asserted dramatic purpose for the relevant NYPD Blue scene, however, was to "convey vividly the embarrassment" a boy feels when he walks in on a naked adult woman in the bathroom. *Id.* at 6; see *id.* at 6 n.6 (emphasizing broadcaster's precautions to protect the child actor from seeing adult nudity while filming). In any event, exposure to nude *strangers* in one's own home is not a typical childhood experience. The assumption that every child has seen nude buttocks does not negate the interests of parents in controlling the circumstances under which their children view such images.

In addition, neither the fact that NYPD Blue was "critically-lauded" (ABC Affiliates Br. in Opp. 29), nor the existence of a plausible storyline rationale for the indecent scene (*i.e.*, the broadcaster's desire to "[t]o convey vividly the embarrassment this encounter caused," ABC Br. in Opp. 6) renders the Commission's finding of

indecency unconstitutional. The Commission has stated that a conclusion that "material has * * * social, scientific or artistic value * * * may militate against finding that it was intended to pander, titillate or shock." *In re Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, 4512 ¶ 11 (2005). But the First Amendment does not require the FCC to establish an across-the-board exception for artistic necessity in this context. As the D.C. Circuit has explained, the Commission's indecency-enforcement regime is "designed to protect unsupervised children," and "some material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value." *ACT I*, 852 F.2d at 1340. The understanding that some worthwhile material may be unsuitable for broadcast radio and television, at least during hours when children are likely to be in the audience, is implicit in the *Pacifica* Court's observation that "a 'nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.'" 438 U.S. at 750 (quoting *Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 388 (1926)); see *ACT I*, 852 F.2d at 1340 n.13 (noting that the "Carlin monologue itself may be an example of indecent material possessing significant social value").

B. Regulation Of Broadcast Indecency Does Not Violate The First Amendment

Respondents more broadly contend (*e.g.*, ABC Br. in Opp. 29) that this Court should overrule *Pacifica* and invalidate Congress's determination that indecent broad-

casting should be regulated. "[E]ven in constitutional cases," however, *stare decisis* "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). No such special justification is present here.

The Commission's indecency-enforcement policy implements Congress's determination that "indecent material is harmful to children," *Fox*, 129 S. Ct. at 1813, and furthers the government's long-recognized "interest in protecting minors from exposure to vulgar and offensive spoken language," *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684 (1986), and images, *Ginsberg*, 390 U.S. at 631-632, 637-643. The policy achieves its objective not by banning the radio or television broadcast of indecent material, but by requiring broadcasters to channel such material to the 10 p.m. to 6 a.m. "safe harbor" hours, when children are less likely to be in the broadcast audience. See *Sable Commc'ns* v. *FCC*, 492 U.S. 115, 127 (1989) ("*Pacifica* is readily distinguishable from these cases, most obviously because it did not involve a total ban on broadcasting indecent material."); *ACT III*, 58 F.3d at 666 (Time-channeling "provide[s] a period in which radio and television stations may let down their hair without worrying whether they have stepped over any line other than that which separates protected speech from obscenity."). In this way, the indecency regime serves the compelling governmental interest of protecting children, while imposing a minimal burden on adults.

1. This Court has "long recognized that each medium of expression presents special First Amendment problems." *Pacifica*, 438 U.S. at 748 (citation omitted). "And

of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Ibid.*; see *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) ("[O]ur cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."). This Court's decisions identify three primary rationales—the scarcity of available broadcast frequencies, the pervasive presence of the broadcast media, and the unique accessibility of broadcast programming to children—for the established rule that broadcast speech may be subject to greater content-based restrictions (with respect to indecency and otherwise) than other forms of communication. Those rationales remain fully applicable today.

a. In applying the First Amendment to broadcast television and radio, this Court has attached significance to "the unique physical limitations of the broadcast medium." *Turner I*, 512 U.S. at 637. "As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters." *Id.* at 637-638 (citation omitted); see, *e.g.*, *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 386-388 (1969); *National Broad. Co.* v. *United States*, 319 U.S. 190, 226 (1943); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

Broadcast licensees have thus received important government assistance, *i.e.*, the license itself (which authorizes use of a valuable public resource without charge)

and the availability of government enforcement mechanisms to prevent others from making unauthorized use of the licensee's allotted frequency or otherwise interfering with the licensee's use of the spectrum. The licensee's acceptance of those benefits has historically carried with it an enforceable obligation to operate the franchise in a manner that serves the public interest. See, *e.g.*, *Fox*, 129 S. Ct. at 1806; *FCC* v. *League of Women Voters*, 468 U.S. 364, 377 (1984); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981). To be sure, a broadcaster's acceptance of a license does not constitute a waiver of all First Amendment protection. See *League of Women Voters*, 468 U.S. at 376-381. But, in light of the distinct physical attributes of broadcast media and the benefits licensees obtain from the government, restrictions on broadcast speech have long been subjected to less demanding First Amendment scrutiny than comparable restrictions on other forms of communication.

Respondents contend (*e.g.*, ABC Br. in Opp. 30-31) that intervening technological developments have rendered the spectrum-scarcity rationale obsolete. It remains true, however, that "there are more would-be broadcasters than frequencies available in the electromagnetic spectrum." *Turner I*, 512 U.S. at 637. And, as explained below (and as the continuing desire of media entities like respondents to maintain a broadcast presence reflects), broadcast media reach far greater numbers of viewers and listeners than do their cable competitors. Broadcast licensees thus continue to receive important benefits from the federal regulatory scheme, even though they face competition from a greater range of alternative media than they did when *Pacifica* was decided. So long as the federal government must exercise selectivity in allocating limited spectrum among numer-

ous licensees (and broadcasters benefit from the use of a valuable public resource without charge), it may constitutionally require licensees to accept content-based restrictions that could not be imposed on other communications media.

b. Even apart from the scarcity of broadcast spectrum and the nature of broadcast licensing, the Court in *Pacifica* explained that regulation of broadcast indecency appropriately reflected the "uniquely pervasive presence in the lives of all Americans" established by broadcasting. 438 U.S. at 748. Given that pervasiveness, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home." *Ibid.* Broadcasting remains a pervasive medium of communications. In 2008, more than 98 percent of households owned a television; the average household had nearly three. U.S. Census Bureau, *Statistical Abstract of the United States: 2011*, at 712, Tbl. 1131, http://www.census.gov/compendia/statab/ (Statistical Abstract); see Pet. App. 79a. In addition, the average household also owned eight radio sets, with 99 percent of U.S. households owning at least one. Statistical Abstract 712, Tbl. 1131.

Although substantial numbers of households now subscribe to cable or satellite, Pet. App. 15a (87 percent), broadcast programming has retained a dominant position in the media universe. Broadcast television continues to be used in approximately 19.6 million households (containing 45.5 million television sets) who do not subscribe to cable or satellite services, and in 14.7 million more households that subscribe to cable and satellite but that own 23.5 million television sets that are not connected to those services. See Thirteenth Annual Report, *In re Annual Assessment of the Status of Competition in the*

Market for the Delivery of Video Programming, 24 FCC Rcd 542, 595 ¶ 108 (2009). Moreover, almost half of direct broadcast satellite subscribers access broadcast channels "over the air," *i.e.*, not through the satellite service. Pet. App. 80a. The National Association of Broadcasters (NAB) recently informed the Commission that "99% of the public relies on local television stations (whether received over-the-air or via cable, telephone wires or satellite) for diverse programming services" and that "[n]o other information platform can match the reach and reliability of free, over-the-air broadcasting." *In re Innovation in the Broad. Television Bands: Allocations, Channel Sharing & Improvements to VHF: Comments of the Nat'l Ass'n of Broadcasters and the Ass'n for Maximum Serv. Television, Inc.*, ET Docket No. 10-235 (filed Mar. 18, 2011), at 3, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021034736.

Even households that subscribe to cable and satellite often use those technologies to access broadcast programming. "[O]f the 495 most-watched television programs during the 2004-2005 season, 485 appeared on broadcast television, and the highest-rated program on cable television was only the 257th most-viewed program of the season." Pet. App. 81a; see TVB Local Media Marketing Solutions, *TV Basics: A Report on the Growth and Scope of Television, Top 100 TV Programs of '09-'10 Season* 11 (2010) ("Broadcast dominated the 2009-10 season, taking 98 of the top 100 programs * * * as well as taking 302 of the top 312 programs.") (http://www.tvb.org/media/file/TVB_FF_TV_Basics.pdf). The continuing dominance of broadcast programming—despite the growth of non-broadcast means of accessing it—is in part attributable to regulatory design. Cable and satellite services are required by statute to retransmit the pro-

gramming aired by local broadcast stations, see 47 U.S.C. 534, 535, and to provide them favored channel positions, 47 U.S.C. 534(b)(6). In enacting these provisions, "Congress sought to preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television, and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable." *Turner I*, 512 U.S. at 652.

c. As when *Pacifica* was decided, the broadcast media remain "uniquely accessible to children." *Pacifica*, 438 U.S. at 749. The Commission recently found that "[i]n spite of the increase in the number of other types of media to which children are exposed, television remains the medium of choice among children." *In re Implementation of the Child Safe Viewing Act*, Report, 24 F.C.C.R. 11,413, 11,416 ¶ 8 (2009) (*CSVA Report*).[5] "According to a 2005 Kaiser Family Foundation Report, 68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections." Pet. App. 80a; see *CSVA Report*, 24 F.C.C.R. at 11,416-11,417 ¶ 8 (citing a 2008 report indicating that two-thirds of children ages 8 to 18 surveyed—and one-third of children younger than eight—had a television set in their bedrooms).

Broadcast programming is particularly accessible to children because its availability to young viewers and listeners does not depend on any affirmative conduct by

[5] Radio broadcasting also continues to play an important role in children's media consumption. Seventy-five percent of minors have a radio in the bedroom. See Henry J. Kaiser Family Foundation, *Generation M2: Media in the Lives of 8- to 18-Year-Olds* (Jan. 2010) at 9, http://www.kff.org/entmedia/upload/8010.pdf.

their parents beyond the initial acquisition of a television or radio. By contrast, "[p]arents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children." Pet. App. 81a. And as this Court explained in *Reno*, indecency on the Internet is not analogous to broadcasting because the Internet "requires the listener to take affirmative steps to receive the communication." 521 U.S. at 870 (quoting *Sable*, 492 U.S. at 128). Thus, while "[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source," the "ease with which children may obtain access to broadcast material * * * amply justif[ies] special treatment of indecent broadcasting." *Pacifica*, 438 U.S. at 749, 750; see *id.* at 758-759 (Powell, J., concurring) (broadcasters "cannot reach willing adults without also reaching children.").

3. Respondents also contend that reconsideration of *Pacifica* is warranted by (a) the proliferation of new technological alternatives to broadcast programming and (b) the development of "V-Chip" technology. Those arguments lack merit.

a. Far from undermining *Pacifica*, the rise of alternative means of video distribution has reduced the burden on speech imposed by broadcast indecency regulation. See *ACT III*, 58 F.3d at 667 ("[A]dults have so many alternative ways of satisfying their tastes" that "it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young."). The Court in *Pacifica* found (in 1978) that the burdens of broadcast indecency regulation were acceptable because "[a]dults who feel the need" to hear or view material that the FCC regarded as indecent

could "purchase tapes and records or go to theaters and nightclubs." 438 U.S. at 750 n.28. Those options remain, but in today's media environment, there are many more as well: adults who want to access such material can do so on a cable-only channel or over the Internet or by renting a DVD. In addition, such material can be broadcast during the post-10 p.m. safe harbor, and (unlike in 1978) it can be viewed by an adult at any time of day by using a digital video recorder.

The availability of these alternative platforms also reduces the burden of broadcast indecency regulation on those who produce programming, who now have multiple means, unavailable at the time *Pacifica* was decided, to disseminate material that is inappropriate for pre-10 p.m. broadcast television. Indeed, each of the major television broadcast networks is affiliated with a cable video distribution network, cable programmer, or both.[6] "[T]echnological advances" have further reduced the burdens of broadcast indecency regulation by "ma[king]

[6] The Commission recently approved a transaction involving NBC Universal (NBCU) and Comcast Corporation that created a joint venture controlling "two broadcast television networks (NBC and Telemundo), 26 broadcast television stations, and NBCU's cable programming (such as CNBC, MSNBC, Bravo, and USA Network)." *In re Applications of Comcast Corp., Gen. Elect. Co. & NBC Universal, Inc.*, 26 F.C.C.R. 4238, 4239-4240, 4243 ¶¶ 1, 8 (2011). The News Corporation owns not only the Fox broadcast network but also cable channels such as FX, the Fox News Channel, and the National Geographic Channel. News Corp., *Annual Report 2010* at 14-15, http://www.newscorp.com/Report2010/AR2010.pdf. The CBS Corporation owns the Showtime cable channel. See CBS Corp., *Our Portfolio*, http://www.cbscorporation.com/portfolio.php?division=101. The Disney/ABC Television Group is part of a joint venture that owns the A&E Network, among other cable channels. See Disney/ABC Television Group, *Overview*, http://www.disneyabctv.com/division/index_facts.shtml.

it easier to bleep out offending words," *Fox*, 129 S. Ct. at 1813, "without adulterating the content of a broadcast," *id.* at 1808.

Notwithstanding the greater range of available video-programming options, the FCC's broadcast-indecency regime continues to serve its original purpose. That is most obviously true with respect to the many millions of households (see pp. 44-45, *supra*) whose televisions receive *only* broadcast programming. But even with respect to households that receive additional video communications through non-broadcast sources, "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children." *Fox*, 129 S. Ct. at 1819.

b. In suggesting that broadcasting is no longer uniquely accessible to children, the court of appeals and respondents place great weight on the availability of the "V-Chip," which is intended to "allow[] parents to block programs based on a standardized rating system." Pet. App. 16a; see ABC Br. in Opp. 26, 27. V-Chip technology provides no basis for overruling *Pacifica*, however, because it has not meaningfully altered "[t]he ease with which children may obtain access to broadcast material." 438 U.S. at 750. Both in the orders under review here and in a subsequent report to Congress, the Commission documented in detail the V-Chip's deficiencies and explained why it is inadequate as a substitute for broadcast indecency regulation. See Pet. App. 81a-83a; *id.* at 171a, 177a-179a; *CSVA Report*, 24 F.C.C.R. 11,418-11,438 ¶¶ 11-55; cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 218-223 (1997) (*Turner II*) (deferring to congressio-

nal judgments about inadequacy of proffered alternatives to challenged regulation).

V-Chips often fail to perform their intended function because particular programming is inaccurately rated. V-Chip "content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." Pet. App. 83a n.162. Inaccurate ratings are so common that a 2004 study found more coarse language broadcast during TV-PG programs than during those rated TV-14, just the opposite of what those age-based ratings would lead a viewer to believe. See *ibid.*

Indeed, none of the three programs at issue in this case was rated in a manner that would have alerted viewers to its potentially objectionable content. The 2002 Billboard Music Awards was rated TV-PG, and the 2003 Billboard Music Awards was rated TV-PG(DL). See Pet. App. 50a, 92a. The TV-PG rating (parental guidance suggested) is the most common rating for television programming, "and merely signifies that the program contains material that parents may find unsuitable for younger children, and that parents may want to watch the program with their younger children." *Id.* at 50a-51a n.47. The "D" signifies that the program may contain some "suggestive dialogue," and the "L" signifies that the program may contain some "infrequent coarse language." *Id.* at 51a n.47. Only in the context of a TV-MA rating (which neither broadcast had) would a "DL" descriptor signify that programming contained "crude indecent language." *Ibid.*; see generally The TV Parental Guidelines, www.tvguidelines.org. ABC's TV-14 (DLV) rating of the relevant NYPD Blue episode ("D" for suggestive or sexual dialogue, "L" for language, and "V" for violence, Pet. App. 84a n.162 (citation omitted))

likewise would not have apprised viewers employing the V-Chip system that nudity would be aired. See *id.* at 178a-179a.

In addition, no radios have a V-Chip, and most of the televisions in use at the time of the broadcasts at issue did not have one either. Pet. App. 81a-82a. Even today, "most parents who have a television set with a V-Chip are unaware of its existence or do not know how to use it." *Id.* at 82a; see S. Rep. No. 268, 110th Cong., 2d Sess. 2 (2008) (Fifty-seven percent of parents who said they had purchased a television since January 1, 2000, were "not aware that they have a V-Chip."). Recent studies show that only between 5% and 16% of all parents use the V-Chip, *CSVA Report*, 24 F.C.C.R. at 11,421-11,422 ¶ 17, perhaps because "many parents find 'programming the V-Chip is a multi-step and often confusing process.'" *Id.* at 11,422 ¶ 19 (citation omitted). Those considerations amply support the Commission's recent determination that "time channeling of indecent * * * broadcasts remains a vital tool for shielding children," and that "[e]vidence of the V-Chip's limited efficacy in facilitating parental supervision of children's exposure to objectionable broadcast content has reinforced the necessity of the Commission's regulation." *Id.* at 11,420 ¶ 14.

4. If all broadcast indecency regulation were held to be prohibited by the First Amendment, Congress and the Commission would lack "any power to regulate erotic telecasts unless they were obscene under *Miller* v. *California*, 413 U.S. 15 [(1973)]," thereby allowing "[a]nything that could be sold at a newsstand for private examination [to be] publicly displayed on television." *Pacifica*, 438 U.S. at 744 n.19 (plurality op.). Such material would include extremely graphic descriptions and images. See, *e.g.*, pp. 6, 26 *supra*. Permitting broadcast of such mate-

rial would upset parents' settled expectations and inappropriately free broadcast licensees of a restraint of which they were fully aware when they secured their licenses.

Since the very beginning of broadcast communications in the 1920s, parents have understood that these media, subject to indecency regulation from their inception, would be relatively safe for their children. That understanding was confirmed by this Court more than 30 years ago when it rejected the contention that "the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances." *Pacifica*, 438 U.S. at 744 (plurality op.); see *id.* at 756 (Powell, J., concurring). In the decades before and after *Pacifica*, millions of Americans grew up and raised children with the understanding that (as George Carlin put it) there are certain words one generally "couldn't say on the public * * * airwaves." *Id.* at 751; see *Reno*, 521 U.S. at 867 (explaining that the Commission has "been regulating radio stations for decades," and that in *Pacifica* the Commission "targeted a specific broadcast that represented a rather dramatic departure from traditional program content.").

The regime of broadcast-indecency regulation upheld in *Pacifica* has thus "become part of our national culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). The rise of alternative, unregulated media platforms has not rendered that regulation obsolete, since many households remain broadcast-only and since broadcast indecency regulation "give[s] conscientious parents a relatively safe haven for their children." *Fox*, 129 S. Ct. at 1819; see *CSVA Report*, 24 F.C.C.R. at 11,420 ¶ 14 ("[R]egulation of broadcast television provides some measure of confidence to parents that their children will

not encounter the same kind or amount of objectionable content on that medium that they might find elsewhere.").

During the same 80-plus-year period in which parents' reliance interests were established, broadcast licensees have reciprocally understood their obligation not to "dramatic[ally] depart[] from traditional program content," *Reno*, 521 U.S. at 867, during times of day when children are likely to be in the audience. Broadcasters have been "granted the free and exclusive use of a limited and valuable part of the public domain," and in return for that benefit they accept "enforceable public obligations," including the modest requirement that they not broadcast indecent material before 10 p.m. *Fox*, 129 S. Ct. at 1806 (internal citation omitted).

As this Court has noted, a "universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional." *Nevada Comm'n on Ethics* v. *Carrigan*, 131 S. Ct. 2343, 2347-2348 (2011) (quoting *Republican Party* v. *White*, 536 U.S. 765, 785 (2002)). While that principle has often led the Court to examine "[e]arly congressional enactments," see, *e.g.*, *id.* at 2348 (internal citation omitted), the founding era for broadcast communication was the 1920s. Since that time, Congress and the Commission have made indecency regulation one of broadcasting's defining features. That longstanding judgment is entitled to this Court's respect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

AUSTIN C. SCHLICK
General Counsel
PETER KARANJIA
Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
NANDAN M. JOSHI
Counsel
Federal Communications Commission

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JOSEPH R. PALMORE
Assistant to the Solicitor General
THOMAS M. BONDY
ANNE MURPHY
Attorneys

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RESPONDENT'S BRIEF

RECORD AND BRIEFS

No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

ABC, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS ABC, INC.; KTRK TELEVISION, INC.; AND WLS TELEVISION, INC.

JOHN W. ZUCKER
ABC, INC.
77 West 66th Street
New York, N.Y. 10023
(212) 456-7387

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL S. VOLCHOK
SONYA L. LEBSACK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Law Library

RULE 29.6 STATEMENT

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

KTRK Television, Inc. and WLS Television, Inc. are indirect, wholly owned subsidiaries of ABC, Inc.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES v

STATEMENT 1

SUMMARY OF ARGUMENT 7

ARGUMENT 12

I. THE FCC'S INDECENCY-ENFORCEMENT POLICY IS UNCONSTITUTIONALLY VAGUE 12

A. The Commission's Generic Definition Of Indecency Is Unconstitutionally Vague 13

B. The Commission Has Failed To Give Meaningful And Consistent Content To Its Definition Of Indecency 14

C. The Commission's Indecency Policy Appears Driven By Content Preferences And Has A Serious Chilling Effect 27

D. Petitioners' Remaining Vagueness Arguments Fail 33

II. THE FCC'S INDECENCY-ENFORCEMENT POLICY VIOLATES THE FIRST AMENDMENT 37

A. *Pacifica* Does Not Allow The Government To Prohibit The Scene At Issue Here 38

B. The V-Chip Precludes Indecency Regulation Of Rated Programs 41

C. Broadcast-Indecency Regulation Should Be Subject To Strict Scrutiny 48

TABLE OF CONTENTS—Continued

Page

D. Petitioners' Historical Argument Lacks Merit....56

CONCLUSION....58

TABLE OF AUTHORITIES

CASES

Page(s)

Action for Children's Television v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) 42

Ashcroft v. *ACLU*, 542 U.S. 656 (2004) 43

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 32

Boos v. *Barry*, 485 U.S. 312 (1988) 43

Brown v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011) ..... *passim*

CBS Corp. v. *FCC*, No. 06-3575, 2011 WL 5176139 (3d Cir. Nov. 2, 2011) 26

Citizens United v. *FEC*, 130 S. Ct. 876 (2010) 37, 56

City of Lakewood v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) 30

Cohen v. *California*, 403 U.S. 15 (1971) 34

Davila-Bardales v. *INS*, 27 F.3d 1 (1st Cir. 1994) 19

Denver Area Educational Telecommunications Consortium, Inc. v. *FCC*, 518 U.S. 727 (1996) 39, 44, 45, 51

Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 38

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 23, 48, 50, 55, 56, 57

FCC v. *League of Women Voters of California*, 468 U.S. 364 (1984) 44, 50

TABLE OF AUTHORITIES—Continued

Page(s)

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) ..... *passim*

Fox Television Stations, Inc. v. *FCC*, 613 F.3d 317 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011) 7, 33, 34

Ginsberg v. *New York*, 390 U.S. 629 (1968) 38

Gooding v. *Wilson*, 405 U.S. 518 (1972) 30

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 12, 27

Greater New Orleans Broadcasting Ass'n v. *United States*, 527 U.S. 173 (1999) 41

Holder v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010) 14, 17, 33, 34

Interstate Circuit, Inc. v. *City of Dallas*, 390 U.S. 676 (1968) 25, 30, 35, 36

Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952) 54, 55

Miller v. *California*, 413 U.S. 15 (1973) 16

Mutual Film Corp. v. *Industrial Commission of Ohio*, 236 U.S. 230 (1915) 55

NAACP v. *Button*, 371 U.S. 415 (1963) 33

Planned Parenthood of Southeastern Pennsylvania v. *Casey*, 505 U.S. 833 (1992) 48

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 10, 11, 49, 50, 55

Reno v. *ACLU*, 521 U.S. 844 (1997) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Sable Communications of California, Inc. v. *FCC*, 492 U.S. 115 (1989) 2, 38, 44, 46

Service v. *Dulles*, 354 U.S. 363 (1957) 16

Snyder v. *Phelps*, 131 S. Ct. 1207 (2011) 37

State v. *Fly*, 501 S.E.2d 656 (N.C. 1998) 15

Troxel v. *Granville*, 530 U.S. 57 (2000) 42

Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994) 29

United States v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) ..... *passim*

United States v. *Stevens*, 130 S. Ct. 1577 (2010) 37

United States v. *Williams*, 553 U.S. 285 (2008) 12, 14, 16, 17

Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 12, 34

STATUTES AND REGULATIONS

18 U.S.C. §1464 ..... 1, 2, 12, 31, 39

47 U.S.C.
§223(d)(1) (2003) 13
§326 50
§503(b)(1) 2
§503(b)(2)(C)(ii) 31

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 43

Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) 7

TABLE OF AUTHORITIES—Continued

Page(s)

47 C.F.R.
§0.445(e) 19
§73.3999(b) 7

ADMINISTRATIVE DECISIONS

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542 (2009) 51

Citadel Broadcasting Co., 16 F.C.C.R. 11839 (2001) 20

Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043 (1987), *aff'd, Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989) 51

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TABLE OF AUTHORITIES—Continued

Page(s)

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En Banc Programming Inquiry, 44 F.C.C. 2303 (1960) 24

Implementation of Section 551 of the Telecommunications Act of 1996, 13 F.C.C.R. 8232 (1998) 43, 47

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In re WUHY-FM, 24 F.C.C.2d 408 (1970) 57

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Page(s)

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Infinity Radio License, Inc., 19 F.C.C.R. 5022 (2004) 27

Letter from Edythe Wise to Susan Cavin, FCC File No. 91100738 (Aug. 13, 1992) 18, 20

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Repeal or Modification of the Personal Attack and Political Editorial Rules, 15 F.C.C.R. 19973 (2000) 51

Rubber City Radio Group, 17 F.C.C.R. 14745 (2002) 16

Rusk Corp. Radio Station KLOL(FM), 5 F.C.C.R. 6332 (1990) 20

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TABLE OF AUTHORITIES—Continued

Page(s)

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Catch-22 (KCET television broadcast Oct. 25, 1997) 18

Devices and Desires: Episode 2 (WUNC television broadcast Oct. 13, 1991) 18

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Gates, Anita, *Sipowicz Cooks Meatloaf? This Sure Is A New Season*, N.Y. Times, Jan. 11, 2000, at E5 23

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Nielsen Media Research—Galaxy Explorer & Npower—Live+7 Data Stream 53

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TABLE OF AUTHORITIES—Continued

Page(s)

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Some Stations Won't Show 'Private Ryan,' N.Y. Times, Nov. 11, 2004, at C6 31

IN THE

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FEDERAL COMMUNICATIONS COMMISSION
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**ON WRIT OF CERTIORARI TO THE
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FOR THE SECOND CIRCUIT**

BRIEF FOR RESPONDENTS ABC, INC.; KTRK TELEVISION, INC.; AND WLS TELEVISION, INC.

STATEMENT

1. Under 18 U.S.C. §1464, it is a criminal offense to broadcast any "indecent" language. The Federal

Communications Commission can impose civil forfeitures for violations of this provision. *See* 47 U.S.C. §503(b)(1). In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court held that the Commission had the authority to enforce §1464's indecency prohibition against a midday radio broadcast of George Carlin's "Filthy Words" monologue, which consisted of seven expletives "repeated over and over as a sort of verbal shock treatment" for nearly twelve minutes. *Id.* at 757 (Powell, J., concurring in part and concurring in the judgment).

Section 1464's prohibition on indecent broadcasts implicates serious constitutional concerns, because "expression which is indecent but not obscene is protected by the First Amendment." *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). Recognizing this point, this Court, both in *Pacifica* itself and in later cases, has "emphasize[d] the narrowness of [*Pacifica*'s] holding." *Pacifica*, 438 U.S. at 750; *see Reno* v. *ACLU*, 521 U.S. 844, 870 (1997) (noting "our 'emphatically narrow holding' in *Pacifica*"). More specifically, the Court in *Pacifica* stated that the question before it was simply "whether the ... Commission has *any* power to regulate a radio broadcast that is indecent but not obscene." 438 U.S. at 729 (emphasis added). And it stressed that its "review is limited to ... whether the Commission has the authority to proscribe this particular broadcast." *Id.* at 742 (plurality opinion).

Justices Powell and Blackmun, whose votes were necessary to uphold the Commission's indecency finding in *Pacifica*, made clear that the Court was not giving the Commission "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves." 438 U.S. at 759-760. They did not expect the Commission's indecency determination to

chill broadcasters' expression because "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 762 n.4.

The Commission initially adhered to *Pacifica*'s message of restraint. *See, e.g., In re WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (¶10) (1978) (stating—in declining to punish a station for broadcasting expletives and nudity—"[w]e intend strictly to observe the narrowness of the *Pacifica* holding"). It brought no indecency-enforcement actions between 1978 and 1987. *See Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930 (¶4) (1987) (subsequent history omitted) (*Infinity*). And even when it expanded indecency enforcement beyond Carlin's seven "filthy words," *see Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (¶12) (1987) (subsequent history omitted), the Commission stated that "the First Amendment dictate[s] a careful and restrained approach" to regulation of broadcast indecency, *Infinity Broad. Corp.*, 2 F.C.C.R. 2705, 2705 (¶6) (1987) (subsequent history omitted).

2. In recent years, however, the Commission has abandoned its restraint, adopting a far more aggressive approach to broadcast indecency. *See* Pet. App. 7a-8a & nn.2-3.

a. In 2008, the Commission issued a forfeiture order finding indecent an episode of *NYPD Blue* that showed a woman's buttocks for seven seconds. *See* Pet. App. 126a-214a. *NYPD Blue*, a one-hour serial drama that featured the lives of New York City police detectives, aired on the ABC Television Network from 1993 to 2005. *Id.* at 127a (¶2). The show was among the most acclaimed dramas in television history, garnering twenty Emmy awards, four Golden Globes, and two Peabodys, among other accolades. Key to the show's

success was its authentic portrayal of the dangers and difficulties faced by its characters in their professional and personal lives. One citation, for example, lauded the show for "provid[ing] gritty and realistic insight into the dilemmas and tragedies which daily confront those who spend their lives in law enforcement."[1]

To achieve this compelling realism, *NYPD Blue* employed coarse language, dramatic depictions of street violence, and mature themes, plotlines, and visual elements, including occasional partial nudity. To inform parents and others about the nature of the material being broadcast, ABC began almost every episode with a prominent visual and verbal advisory detailing the episode's mature content. After the TV Parental Guideline ratings were adopted in 1997, ABC also gave each episode a TV-14 rating, meaning "Parents Strongly Cautioned—This program contains some material that many parents would find unsuitable for children under 14 years of age." Episodes were subsequently given appropriate content descriptors as well (language, violence, etc.), and coded to allow blocking with the V-chip, a device that empowers viewers to block broadcasts based on their age rating, content descriptors, or both.[2] *See infra* pp.42-43.

b. The episode at issue here was broadcast in February 2003, during the last hour of primetime television—from 10 to 11 pm in the Eastern and Pacific time zones and from 9 to 10 pm in the Central and Mountain time zones. Like many episodes, it explored

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[1] Peabody Awards, http://www.peabody.uga.edu/winners/details.php?id=157 (visited Nov. 2, 2011).

[2] FCC V-Chip, http://fcc.gov/vchip (visited Nov. 2, 2011).

the personal life of a leading character, Detective Andy Sipowicz. As regular viewers knew, Sipowicz's wife had died several seasons earlier, leaving him alone to raise their young son Theo. Sipowicz later became romantically involved with another detective, Connie McDowell. As their relationship developed, the two often worried about its effect on Theo, a theme addressed in multiple episodes. Shortly before the episode at issue here, Sipowicz and Theo moved into McDowell's apartment.

The broadcast began with a full-screen, eight-second visual and audio advisory informing viewers that "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED."[3] The advisory and the program's opening frames also displayed a TV-14(DLV) rating. The episode thus would have been blocked from any television with a V-chip set for broadcasts carrying either that age rating or any one of the content descriptions (intensely suggestive dialogue, strong coarse language, or intense violence). The advisory was followed by a 30-second recap of prior episodes and then immediately by the scene at issue.

The scene begins with McDowell entering her bathroom to take a shower. Like anyone preparing to shower, she turns on the water and disrobes. Moments later, Theo, first shown waking up and getting out of bed, opens the bathroom door, unaware that McDowell is inside. Both characters are startled and embarrassed. McDowell covers herself with her arms, and Theo quickly retreats, closing the door as he apologizes.

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[3] A DVD copy of the episode was submitted with the petition.

To convey vividly the embarrassment this encounter caused, the scene briefly depicts McDowell naked from behind and the side (hence the prominent advisory about partial nudity). In two shots before Theo opens the bathroom door, McDowell's buttocks are fully visible for five seconds and partially visible for two seconds. McDowell's pubic area is never shown, and her breasts are visible only from the side or otherwise obscured. At no point in the scene does either character engage in sexual or excretory activity, or display any sexual interest.[4]

3. Almost a year after the episode aired, FCC staff sent ABC a letter of inquiry stating that the episode had been the subject of indecency complaints. Pet. App. 127a (¶2). ABC submitted a tape and transcript of the episode, along with letters explaining why the episode contained no indecent material. *Id.*

Four years later, the Commission issued a notice of apparent liability, asserting that the broadcast was indecent. *See* Pet. App. 215a-262a. The Commission reaffirmed that determination in a forfeiture order and imposed the then-maximum fine of $27,500 on each of 45 stations—two owned by ABC, Inc. and 43 affiliated with the ABC network—that had broadcast the episode in the Central or Mountain time zone, for a total fine of

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[4] During the scene's taping, the actress playing McDowell wore opaque fabric over her pubic area and parts of her breasts. In compliance with California law, both the mother of the actor who played Theo and a certified studio teacher/welfare worker were present during the rehearsal and filming of the scene.

nearly $1.24 million. *See id.* at 126a-214a.[5] (As noted, the episode aired at 10 pm in the Eastern and Pacific time zones, within the 10-pm-to-6-am "safe harbor." *See* 47 C.F.R. §73.3999(b).)

ABC paid the fine and sought review in the Second Circuit. While the case was pending, a different Second Circuit panel held in *Fox Television Stations, Inc.* v. *FCC*, 613 F.3d 317 (2d Cir. 2010), that the Commission's indecency-enforcement policy is unconstitutionally vague. *See* Pet. App. 1a-34a. The panel assigned to ABC's challenge directed the parties to file supplemental briefs addressing the impact of *Fox*. Petitioners responded that there were no material factual distinctions between *Fox* and this case, and thus under the *Fox* decision the forfeiture order was invalid. *See* Supp. Br. for FCC and United States 3, *ABC, Inc.* v. *FCC*, No. 08-0841-ag (2d Cir. Aug. 23, 2010) (Gov't CA2 Supp. Br.). The *ABC* panel agreed and set aside the forfeiture order. *See* Pet. App. 124a-125a.

SUMMARY OF ARGUMENT

I. The Commission's current indecency-enforcement policy violates due process because it is impermissibly vague, both as applied in this case and on its face.

A. This Court concluded in *Reno* v. *ACLU* that a statutory standard virtually identical to the Commission's generic indecency standard was unconstitutionally vague. *Reno* thus requires invalidation of the

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[5] Congress increased the maximum fine more than tenfold in 2006. *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, §2, 120 Stat. 491, 491 (2006).

Commission's generic standard unless it can be meaningfully distinguished from the one at issue in that case.

B. Petitioners claim such a distinction in the Commission's elaboration of the generic standard—both in the 2001 *Industry Guidance*[6] and in subsequent decisions applying the standard to particular broadcasts. Neither point remedies the vagueness problem. First, the *Industry Guidance* does not set forth specific criteria that must be satisfied for a broadcast to be found indecent. It simply enumerates three "factors" with no indication as to how they will be weighed against one another—or against other, unannounced factors. And the factors themselves are so capacious and subjective that they could not alone provide ABC with constitutionally sufficient notice that the seven-second, non-sexual display of buttocks at issue would be deemed indecent.

Commission precedent likewise failed to provide ABC with constitutionally adequate notice. Before the broadcast at issue, the Commission had declared that even full frontal nudity was not *per se* indecent, rejected indecency complaints against broadcasts that included lengthier displays of nudity, and emphasized the highly sexualized nature of the material it did find indecent. Petitioners cite no Commission decision deeming material like this scene to be indecent.

More generally, the Commission's application of its standard in recent years has been markedly inconsistent. From case to case the Commission reaches its de-

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[6] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 (2001).

sired result by giving more or less weight to each of the three patent-offensiveness factors, while also heavily weighting or instead ignoring other, sometimes unannounced factors. The result is that broadcasters have no way to know what material the Commission will deem indecent.

C. The Commission's vague standard has led to both arbitrary enforcement and a chill on protected expression. The Commission appears to base indecency determinations on its own artistic judgments, in derogation of fundamental constitutional principles. Broadcasters have thus refrained from engaging in constitutionally protected expression for fear of incurring multi-million dollar fines and license revocations.

D. Although petitioners fault the Second Circuit for examining the Commission's indecency-enforcement policy beyond this case, they themselves invoked Commission decisions regarding other broadcasts, and ABC was entitled to mount a facial vagueness challenge because its conduct was not clearly proscribed. Petitioners also cannot justify the Commission's inconsistent precedent by vaguely invoking "context." And forcing broadcasters to air questionable material during the safe harbor would severely curtail broadcasters' ability to engage in constitutionally protected expression. The fact that networks' internal standards call for careful review of powerful words and images, such as expletives and nudity, does not mean that the government can restrict or punish such use. Finally, the Second Circuit did not, as petitioners suggest, limit the Commission to prohibiting specific words and images.

II. The Commission's indecency-enforcement regime also violates the First Amendment.

A. Even under *Pacifica*, the government may not prohibit the brief non-sexual display of nudity at issue here. This Court has rarely permitted content-based restrictions on indecent material, and in evaluating such restrictions it has looked primarily to whether the material was sexualized, as well as to whether children would be exposed to it for an extended period. Neither factor is met here. Petitioners have failed even to articulate what harm children suffer from viewing the scene.

B. Unlike when *Pacifica* was decided, the government today can support parents' choices regarding what their children will see on television without resort to content-based restrictions. The V-chip and similar blocking technologies—which both Congress and the Commission have deemed effective—provide a less restrictive alternative. This Court has consistently held that where such an alternative is available, the government may not restrict constitutionally protected expression. Petitioners' criticisms of the V-chip, like criticisms this Court has rejected in the past as to other technologies, are insufficient to justify content-based restrictions.

C. Although the *ABC* forfeiture order is infirm even under current precedent, there is no basis today for reduced First Amendment scrutiny of broadcast indecency regulations.

Decades ago, this Court upheld some regulation of broadcasters under a theory of "spectrum scarcity." *See, e.g., Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 392-396 (1969). Petitioners invoke that theory, but neither the Court nor the Commission has ever relied on it to justify *indecency* restrictions. Doing so for the first time now would be particularly unwarranted. Techno-

logical developments have both vastly increased the available spectrum and provided other outlets for communication. If spectrum scarcity is now necessary to support the Commission's indecency-enforcement policy, *Red Lion* should be overruled.

Pacifica justified reduced First Amendment scrutiny of broadcast indecency regulation on the theory that broadcasting was uniquely pervasive and uniquely accessible to children. Neither predicate is true today. The vast majority of American households receive television through cable or satellite, and therefore receive numerous non-broadcast channels to the same extent, and with the same accessibility to children, as broadcast channels. The Internet also brings words and images (including broadcast television shows) into people's homes. And parents now have technological means to block broadcast channels and programs, which did not exist when *Pacifica* was decided. Petitioners' arguments—that a small percentage of households have only broadcast television, that some parents choose to allow their children to have broadcast-only televisions in their rooms, and that broadcasters could use other media for possibly indecent material—are too insubstantial to justify this restraint on constitutionally protected expression.

D. There is no merit to petitioners' argument that the supposed 80-year history of indecency regulation supports reversal. The Commission conducted virtually no enforcement for most of that time, including almost a decade after *Pacifica*, and hence the enforcement regime was not challenged. There is thus no basis for a "presumption" of constitutionality.

ARGUMENT

I. THE FCC'S INDECENCY-ENFORCEMENT POLICY IS UNCONSTITUTIONALLY VAGUE

The Second Circuit correctly concluded that the Commission's current indecency-enforcement policy is impermissibly vague and powerfully chills broadcasters' constitutionally protected expression. The policy's vagueness is evident both in its application to the *NYPD Blue* episode at issue and more generally.

An elemental requirement of due process is that the government "provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). Vague laws "trap the innocent by not providing fair warning" and foster "arbitrary and discriminatory enforcement." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). A "more stringent vagueness test" applies, moreover, when a regulation "interferes with the right of free speech." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). And vagueness here "is a matter of special concern" because §1464 "is a criminal statute" and "a content-based regulation of speech" with an "obvious chilling effect." *Reno*, 521 U.S. at 871, 872.

In *ABC*, the Commission found indecent a seven-second, non-sexual display of buttocks that was accompanied by a prominent viewer advisory and that constituted an element of a serious, non-sexual storyline in a properly rated episode of a highly acclaimed series. That finding violates due process because ABC lacked fair warning that such a display would be deemed indecent. And while that suffices to affirm the judgment in *ABC*, the broader point is that neither the Commission's generic definition of indecency, nor the factors

discussed in the *Industry Guidance* that supposedly give further content to that definition, nor the Commission's application of those factors, gave broadcasters the required notice about what the Commission would deem "indecent." The inevitable result has been that broadcasters have trimmed their sails and refrained from speaking rather than risk enormous penalties.

A. The Commission's Generic Definition Of Indecency Is Unconstitutionally Vague

The Commission's generic standard for broadcast indecency is essentially identical to the indecency standard for online material that this Court declared unconstitutionally vague in *Reno*. The Commission's standard defines broadcast material as indecent if it, "in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." Pet. App. 45a (¶15). In *Reno*, this Court addressed a statute banning online distribution of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. §223(d)(1) (2003). In holding the statute unconstitutional, the Court explained that this standard "lacks the precision that the First Amendment requires when a statute regulates the content of speech," 521 U.S. at 874, expressing particular concern with "the vagueness inherent in the open-ended term 'patently offensive,'" *id.* at 873.

Despite *Reno*, petitioners argue that *Pacifica* forecloses a vagueness challenge to the Commission's indecency regime (or at least to the term "indecent"). But no vagueness claim was advanced in *Pacifica*; the broadcaster stipulated that the material was "patently

offensive" and argued instead that "indecency" necessarily entailed prurient appeal. *See* 438 U.S. at 739.[7]

In the orders under review, the Commission took a different but equally unpersuasive tack, dismissing *Reno* on the ground that it "expressly distinguished *Pacifica*." Pet. App. 77a (¶45), 173a (¶41). But as the Second Circuit explained, *Reno* distinguished *Pacifica* regarding "'the level of First Amendment scrutiny that should be applied to this medium,' not ... whether the statute was unconstitutionally vague. Broadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny." *Id.* at 21a (quoting *Reno*, 521 U.S. at 870).

B. The Commission Has Failed To Give Meaningful And Consistent Content To Its Definition Of Indecency

Given that, under *Reno*, the Commission's generic broadcast indecency standard is unconstitutionally vague, petitioners have the burden to show that the Commission—either through further refining that standard or through its adjudications—has given it content sufficiently clear and consistent to place broadcasters on notice of what material will be deemed indecent. And indeed, petitioners have sought to distinguish *Reno* on the ground that the Commission has

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[7] Any claim that the word "indecent" is in itself sufficiently clear is foreclosed by a phalanx of post-*Pacifica* precedent, including *Reno*. *See Williams*, 553 U.S. at 306 ("[W]e have struck down statutes that tied criminal culpability to whether the defendant's conduct was ... 'indecent.'" (citing *Reno*, 521 U.S. at 870-871 & n.35)), *cited in Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010).

elaborated on its generic standard for broadcast indecency, first in the *Industry Guidance* and second in its application of the standard to various broadcasts.

Neither supposed elaboration cures the vagueness problem, either regarding the *ABC* indecency finding or generally. If anything, the Commission's refinements have made matters worse. While the Commission has articulated several factors on which it assertedly bases its indecency decisions, the factors are themselves so capacious and subjective, and the Commission has applied them in such a conclusory and ad hoc fashion, that broadcasters cannot know with any degree of assurance whether the Commission will find a particular broadcast indecent.

1. *Threshold Test.* The Commission explained in 2001 that its standard includes a threshold test: To be indecent, "material *must* describe or depict sexual or excretory organs or activities." *Industry Guidance*, 16 F.C.C.R. at 8002 (¶7) (emphasis added). In *ABC*, the Commission found this requirement satisfied on the ground that buttocks are a sexual or excretory organ. But that is wrong. Buttocks are not such an organ—or, indeed, an organ at all. *See, e.g.*, *State* v. *Fly*, 501 S.E.2d 656, 659 (N.C. 1998).

The Commission acknowledged below that buttocks do not meet "a technical physiological definition" of the term organ, but asserted that it was "[in]appropriate" for the term to be limited in that fashion. Pet. App. at 136a (¶9). That is untenable. The Commission promulgated its threshold test to settle litigation challenging its indecency standard as vague. *See Industry Guidance*, 16 F.C.C.R. at 8016 n.23 (¶30). The Commission could have adopted a threshold test that plainly encompassed buttocks. But having instead

chosen a term ("sexual or excretory organ") with a clear meaning that does *not* include buttocks, the Commission may not assert that, for purposes of its test, the term actually has some other meaning. *See Service* v. *Dulles*, 354 U.S. 363, 388 (1957). Such an approach does not "provide a person of ordinary intelligence"—who surely assumes that a term has its normal meaning—"fair notice of what is prohibited." *Williams*, 553 U.S. at 304.[8]

2. *Patent-Offensiveness Factors.* The *Industry Guidance* also announced three "factors" that would inform the Commission's patent-offensiveness determinations. Those factors, however, are not a *definition* of indecency. Unlike the constitutionally-informed definition of obscenity, *see Miller* v. *California*, 413 U.S. 15, 24-25 (1973), the *Industry Guidance* does not set forth specific criteria that must be satisfied for a broadcast to be found "indecent." Rather, the Commission's three factors are just that—factors—and neither the *Indus-*

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[8] Commission precedent likewise gave ABC no fair notice of the FCC's curious view that buttocks are an organ. The Commission below cited only one case predating the *NYPD Blue* broadcast. *See* Pet. App. 133a-134a & nn.28-29 (¶8). But that case involved radio dialogue describing "a sadistic act of simulated anal sodomy." *Rubber City Radio Group*, 17 F.C.C.R. 14745, 14747 (¶7) (2002). The "excretory organ" referred to there was the anus, not buttocks. The Commission's reliance (Pet. App. 133a & n.28 (¶8)) on a music video deemed indecent in *Complaints Regarding Various Television Broadcasts*, 21 F.C.C.R. 2664, 2681 (¶62) (2006), is also misplaced. That decision postdates the broadcast at issue here, and, in any event, the video "focused entirely on the repetition of simulated sexual activity with accompanying lyrics that describe such activity," *id.* at 2681 (¶63). It is thus categorically different from the brief, non-sexual display of nudity at issue in this case.

try Guidance nor subsequent precedent gives any indication as to how they ought to be weighed against one another (or other factors). To the contrary, the weighing process is opaque and unpredictable. *E.g.*, Pet. App. 46a (¶15) ("one or two of the factors may outweigh the others ... rendering the broadcast ... indecent"). Broadcasters are thus left to guess how the Commission will apply those factors in a particular case.

On their face, the factors themselves are so imprecise and subjective that they provide little meaningful notice. Terms like "*dwell[ed] on or repeat[ed] at length*," *Industry Guidance*, 16 F.C.C.R. at 8003 (¶10), may be stretched to suit almost any circumstance. Indeed, if two shots of partial nudity that total seven seconds constitute "dwell[ing]" or "repeat[ing] at length," then those terms have no meaningful content. Even more problematic are the words employed in another patent-offensiveness factor: whether material "*appears to pander[,] ... titillate*, or ... *shock*." *Id.* Given the range of human reaction, taste, and experience, those terms could apply to such a wide swath of protected expression that they cannot possibly "provide a person of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U.S. at 304; *see also Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) ("We have ... 'struck down statutes that tied criminal culpability to ... wholly subjective judgments.'") (*HLP*).

3. *Commission Precedent.* Perhaps the Commission might have found a way to apply these open-ended terms both consistently and with due regard for the First Amendment, so that broadcasters deciding whether to air a program would know whether such a program would be considered indecent. But again, the opposite has been true. The Commission's recent deci-

sions applying the indecency factors (and its standard more generally) are a wilderness of confusion for broadcasters, leading them to steer far clear of any material that might be deemed indecent rather than risk incurring multi-million dollar fines and license revocations. To the extent sense can be made of the Commission's precedent, nothing in it would have led ABC to suspect in 2003 that a non-sexualized, seven-second display of buttocks in the context of a serious drama would be considered indecent. Quite the contrary: all the Commission's decisions that were even remotely analogous pointed in the opposite direction.

a. On the question whether the material was "dwelled on" or "repeated at length," the Commission found that the display of buttocks here "provides some support" for an indecency finding. Pet. App. 142a (¶15). Yet prior to the broadcast in question, the Commission deemed 40 seconds of nudity in a broadcast of the movie *Catch-22* (including 10 seconds of full frontal nudity and 30 seconds in which buttocks are fully exposed) to be "very brief," and concluded that the nudity was not indecent "in [the] context of a full length drama, the primary theme of which was the horrors of war." Letter from Norman Goldstein to David Molina, FCC File No. 97110028 (May 26, 1999); *see Catch-22* (KCET television broadcast Oct. 25, 1997), at 23:41-24:08, 54:50-55:20; *see also* Letter from Edythe Wise to Susan Cavin, FCC File No. 91100738 (Aug. 13, 1992) (finding 31 seconds of female frontal nudity in the miniseries *Devices and Desires* "not actionably indecent"); *Devices and Desires: Episode 2* (WUNC television

broadcast Oct. 13, 1991), at 25:42-25:55, 28:58-29:22.[9] And subsequent to the broadcast here, in a case involving an eight-second depiction of buttocks, the Commission cited the depiction's "brevity" in deeming the material not indecent. J.A. 168 (¶226).

The Commission has not explained this inconsistency, instead attempting to justify the different ultimate outcomes in these cases on other grounds. *See* Cert. Reply 7. But the fact that the Commission can point to some *other* difference between broadcasts does not justify its inconsistent application of the factors that purportedly avoid the vagueness "inherent" in its indecency standard, *Reno*, 521 U.S. at 873. If the Commission is effectively ignoring the factors and simply making gestalt indecency determinations, then the factors are not a basis for distinguishing the Commission's standard from the one the Court invalidated in *Reno*.

b. As to whether the material "appears to pander[,] ... titillate, or ... shock," *Industry Guidance*, 16 F.C.C.R. at 8003 (¶10) (emphasis omitted), nothing in the Commission's precedent provided ABC with notice

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[9] The Commission argued below that ABC could not rely on unpublished decisions. There is, however, "no earthly reason why the mere fact of nonpublication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases." *Davila-Bardales* v. *INS*, 27 F.3d 1, 5-6 (1st Cir. 1994). In any event, even if agencies enjoy immunity against citation to unpublished decisions as a general matter, they can surely waive it, and the Commission has done so: Its rule regarding unpublished decisions allows their citation "against persons who have actual notice of the document in question *or by such persons against the Commission*." 47 C.F.R. §0.445(e) (emphasis added).

that the brief, non-sexualized appearance of buttocks in the context of a dramatic scene would meet this factor. Two years before the *NYPD Blue* broadcast in question, the Commission assured broadcasters that even "full frontal nudity is not *per se* indecent." *Industry Guidance*, 16 F.C.C.R. at 8012 (¶21). And before that, the Commission rejected indecency complaints concerning nudity, including full frontal nudity. *See* Molina Letter, *supra*; Cavin Letter, *supra* (female frontal nudity in a love scene and a beach scene); *WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1841 (¶11) (2000) (rejecting complaint regarding a broadcast of *Schindler's List*).

By contrast, Commission decisions deeming broadcasts indecent issued before the *NYPD Blue* broadcast emphasized that material was "shocking, pandering, or titillating" because it was used in a highly sexualized (or excretory) fashion. *See Citadel Broad. Co.*, 16 F.C.C.R. 11839, 11840 (¶6) (2001) ("lyrics contain[ing] sexual references in conjunction with sexual expletives ... appear intended to pander and shock"); *Industry Guidance*, 16 F.C.C.R. at 8010 (¶20) (citing *Rusk Corp. Radio Station KLOL(FM)*, 5 F.C.C.R. 6332 (1990), as deeming patently offensive an "[e]xplicit description ... that focused on sexual activities in a lewd, vulgar, pandering and titillating manner"). These decisions provided no notice to ABC in 2003 that the Commission would deem this non-sexual scene "shocking, pandering, or titillating."

Indeed, numerous Commission decisions since the broadcast rejected indecency complaints where references to sexual or excretory organs or activities were *not* "eroticized," J.A. 130 (¶160), 131 (¶162), or distinctly excretory. For example, the Commission concluded that a scene from *Will & Grace* showing a man

and woman touching and adjusting another woman's clothed breasts as she prepared for a date was not shocking, pandering, or titillating because "the touching of the breasts is not portrayed in a sexualized manner." J.A. 129 (¶158). Similarly, the Commission found that the depiction of a baby's buttocks on *America's Funniest Home Videos* was not shocking, pandering, or titillating because it was "not sexualized in any manner." J.A. 168 (¶226); *see also* J.A. 138, 139 (¶¶175-176, 178) ("highly graphic and explicit" descriptions of "sexual practices," which "continue[d] at length" on an episode of Oprah Winfrey deemed not patently offensive because they were not done in a "vulgar" way); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1931, 1932-1938 (¶¶3-8) (2005) (deeming not indecent explicit references to "testicles," "nipples," "penis," "breasts," and other body parts, including "I am this close to tugging on my testicles again").

c. Other Commission rulings since the *NYPD Blue* broadcast illustrate the inconsistent nature of recent FCC decisions. For example, the Commission has declared that every use of "shit" or its many variants (including "bullshit") "invariably invokes a coarse excretory image." J.A. 121 (¶138). Yet it has treated comparable words differently. It has made clear, for instance, that the phrase "a lot of crap" is less likely to be deemed indecent because it—purportedly unlike "bullshit"—is "fairly commonly used in a non-sexual, non-excretory manner." J.A. 110-111 n.180. And it has excused utterances of "ass" on the ground that that word (again supposedly unlike "bullshit") can be "used in a nonsexual sense to denigrate or insult the speaker or another character." J.A. 153 (¶197). These arbitrary distinctions

leave broadcasters with no way to know which other words three commissioners will decide "invariably" refer to excrement or sexuality or, rather, are "commonly used in a non-sexual, non-excretory manner."

Similarly, the Commission has declared that uses of "dick" or "dickhead" in earlier *NYPD Blue* episodes were not patently offensive because they were neither "sufficiently vulgar, explicit, or graphic," nor "sufficiently shocking." J.A. 115 (¶127). Yet in the next breath it declared that individual uses of "bullshit" in *NYPD Blue* episodes *were* patently offensive because each was "vulgar, graphic and explicit," and "shocking and gratuitous." J.A. 116, 117 (¶¶128, 130).[10] Petitioners assert (Br. 28-29) that "[i]n making that distinction, the Commission reasonably assessed the graphic nature and social acceptability of these words." But no "assessment" is evident; the Commission simply proclaimed that specific words were or were not sufficiently shocking, vulgar, and so on to warrant an indecency finding. That is decree, not analysis.

d. The Commission has also offered inconsistent assessments of the importance of viewer advisories and the V-chip. Prior to the *NYPD Blue* broadcast, the Commission rejected an indecency complaint regarding the airing of *Schindler's List* in part because "[parental advisory] warnings ... accompanied the broadcast." *WPBN/WTOM*, 15 F.C.C.R. at 1842 (¶13). The Commission similarly emphasized in 2005 that ABC had included on-air viewer advisories and V-chip ratings in rejecting indecency complaints against a broadcast of

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[10] The Commission later dismissed the indecency complaints regarding these *NYPD Blue* broadcasts, on procedural grounds. Pet. App. 10a & n.5.

the film *Saving Private Ryan*. *See Complaints Against Various Television Licensees Regarding "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4508 & nn.8-9 (¶3), 4513 (¶15) (2005) (*Saving Private Ryan*). Those warnings, the Commission said, alerted parents to the fact that the program was "not intended as family entertainment," thus enabling parents to "exercise their own judgment" about whether to allow their children to view it. *Id.* at 4513 (¶15).

The *NYPD Blue* broadcast at issue here also carried a clear viewer advisory and a V-chip rating, yet the Commission's only explanation for why those warnings did not render the brief nudity—which was far less extensive than the nudity in *Schindler's List* or the dozens of harsh expletives in *Saving Private Ryan*—not indecent was that "[i]n context and on balance," they were not enough. Pet. App. 148a (¶18). That marked inconsistency further demonstrates that ABC had no notice that this broadcast would be deemed indecent.

Moreover, as petitioners themselves point out, in *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1814 (2009), this Court observed that the Commission could reasonably conclude that the adult themes in *Saving Private Ryan* could "dissuade the most vulnerable from watching and ... put parents on notice of potentially objectionable material." The same is true here. ABC expressly, with ratings and advisories, alerted parents that the *NYPD Blue* broadcast contained material that some parents might think was inappropriate for "the most vulnerable," *id.*, thereby empowering parental choice. Indeed, at the time of this broadcast, *NYPD Blue* was in its tenth season, and throughout the show's run there had been extensive media coverage about its mature content and occasional use of partial nudity. *See, e.g.*, Gates, *Sipowicz Cooks Meatloaf?*

This Sure Is A New Season, N.Y. Times, Jan. 11, 2000, at E5; Andrews, *Mild Slap At TV Violence*, N.Y. Times, July 1, 1993, at A1. Parents and other viewers thus had every reason to be aware by 2003 of the program's mature elements and intended audience.

In sum, there was nothing in the indecency standard itself or in past precedent that would lead ABC to conclude that the Commission would find the non-sexualized scene here—involving a woman preparing for the quotidian activity of her morning shower before work, followed by a momentary and embarrassing encounter with a child—to be indecent, particularly when presented as part of a serious and non-sexual storyline in a properly rated (and hence blockable) episode of a long-running and highly acclaimed dramatic series. And subsequent Commission decisions leave broadcasters without any adequate guidance as to what constitutes broadcast indecency.

4. *Petitioners' Fair-Notice Arguments.* Petitioners contend that ABC nonetheless had fair notice that the episode here would be deemed indecent because of an FCC decision from *1960*, in which the Commission observed that "while a nudist magazine may be within the protection of the First Amendment ... the televising of nudes might well raise a serious question of" indecency. *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2307 (1960). That nebulous observation about the broadcast of material similar to that found in a "nudist magazine" does not provide fair notice in 2003 that the scene here—involving the brief non-sexualized display of partial nudity in a dramatic context—was prohibited. This is particularly true given the Commission's more recent and more concrete guidance regarding the indecency implications of broadcast nudity. *See supra* pp.18-21.

Petitioners notably make *no* argument that the Commission's standard itself, even as elaborated in the *Industry Guidance*, gave ABC fair notice. Instead, they quote the Commission's assertion below that the scene was shocking, pandering, or titillating because it supposedly "placed the audience in the 'voyeuristic position' of observing a naked woman preparing to shower, and [because] the manner in which the scene was shot 'highlights the salacious aspect of the scene.'" Pet Br. 16-17 (quoting Pet. App. 143a-144a). But adding adjectives ("voyeuristic" and "salacious") to shocking, pandering, or titillating does not ameliorate the vagueness problem. What is critical is that the Commission has never pointed to anything in the scene with a sexual or excretory aspect—because there is nothing. To the contrary, the Commission acknowledged in the forfeiture order that "the scene does not depict any sexual response in the child." Pet. App. 144a (¶16).[11]

Finally, petitioners assert that ABC's fair-notice argument rests on only a single published decision (involving *Schindler's List*) in which the Commission had rejected indecency complaints involving longer displays

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[11] The Commission is thus driven to contend that the scene was shocking, pandering, or titillating because some viewers might find the images sexually appealing. *See, e.g.*, Pet. App. 143a (¶16) ("The viewer [watches] an attractive woman disrobing[.]"). Given the near-infinite variety of sexual tastes and preferences, that subjective approach does not provide constitutionally sufficient notice. As this Court has observed, government reliance on viewers' subjective sexual reaction to images "strikingly illustrate[s]" "[t]he dangers inherent in vagueness." *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 685 (1968). Those dangers are fully realized here.

of nudity.[12] That assertion ignores the Commission's other pre-2003 decisions that rejected indecency complaints involving nudity. *See supra* pp.18-21. Petitioners' argument also improperly limits the universe of relevant decisions to ones involving nudity. Those are obviously pertinent, but so are other Commission decisions, because at the time of the broadcast at issue here the Commission had never suggested that images and words are treated differently for indecency purposes. *See CBS Corp.* v. *FCC*, No. 06-3575, 2011 WL 5176139, at *22 (3d Cir. Nov. 2, 2011).

More fundamentally, petitioners' argument inappropriately puts the onus on ABC to cite precedent demonstrating that the episode here would not be deemed indecent. But given that petitioners do not even venture to argue that the text of the Commission's indecency test provided adequate notice, it is they who must show that FCC precedent affirmatively did so, because otherwise *nothing* provided such notice. Petitioners cannot make that showing—and that is the dispositive point: Petitioners have failed to cite *any* Commission decision deeming material remotely like the scene here to be indecent.

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[12] Contrary to petitioners' suggestion (Br. 19), ABC does not contend that the *Schindler's List* and *NYPD Blue* scenes are equivalent at some general level. Rather, the two cases are similar *in terms of the indecency factors on which the Commission relied*. Specifically, each appeared in a serious award-winning dramatic series or film and was accompanied by a viewer advisory; neither involved anything sexual or excretory; and the nudity in *Schindler's List* was more extensive (full frontal compared to buttocks), no less graphic and explicit, significantly lengthier, and much more shocking.

C. The Commission's Indecency Policy Appears Driven By Content Preferences And Has A Serious Chilling Effect

The Commission's vague indecency standard has produced two of the effects that the prohibition on vague laws is designed to avoid: arbitrary enforcement and chilling of protected expression. *See Grayned*, 408 U.S. at 108-109; *Reno*, 521 U.S. at 871-872. Its inconsistent decisionmaking appears driven by the commissioners' personal views about the merits of particular programming. And as the Second Circuit explained, broadcasters' constitutionally protected expression has been severely chilled as a result.

1. The Commission purports to base its determinations of whether material is "patently offensive" on "contemporary community standards for the broadcast medium." *E.g.*, Pet. App. 45a (¶15). But while the Commission has said that this standard reflects that "'of an average broadcast viewer or listener,'" *Industry Guidance*, 16 F.C.C.R. at 8002 (¶8); *see also id.* at n.15, it has never identified any objective criteria upon which it bases its assessments. To the contrary, the Commission has repeatedly stated that "our collective experience and knowledge" is "developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens." *Infinity Radio License, Inc.*, 19 F.C.C.R. 5022, 5026 (¶12) (2004). But this amounts to an acknowledgement that indecency determinations are driven by shifting outside political pressures and essentially left to the commissioners' own subjective tastes and judgments.[13]

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[13] As the ABC Affiliates explain (Br. 8), this entire proceeding originated with interest-group pressure. Virtually all of the

This supposed reliance on "community standards" is nothing more than the impermissible practice of the Commission resting indecency determinations on its own evaluation of a work's artistic merit. For example, the Commission declared that *Saving Private Ryan* was not indecent partly because the pervasive uses of "fuck," "shit," and other expletives were "integral to the film[]" and "[e]ssential to the ability of the filmmaker to convey" his message, and hence omitting them "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." 20 F.C.C.R. at 4512, 4513 (¶14). Yet the Commission held that much-more-limited expletives in *The Blues*, a PBS documentary about jazz musicians, were indecent because the documentary's educational purposes "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." J.A. 91 (¶82). Similarly, the Commission held that a single "bullshit" in each of several earlier *NYPD Blue* episodes was indecent—even though "the expletives may have made some contribution to the authentic feel of the program"—because "we believe that purpose could have been fulfilled and all viewpoints expressed without the ... expletives." J.A. 119 (¶134).

The Commission's use of such artistic judgments in making indecency determinations is thoroughly anti-

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approximately one hundred complaints the Commission received were mass-generated from a single advocacy group. Given that this episode of *NYPD Blue* reached 11.6 million viewers in its initial broadcast and 5.7 million in its rebroadcast five months later, *see* ABC Response to FCC Letter of Inquiry 9 n.7 (Feb. 17, 2004) (C.A.J.A. 51), the views of that tiny minority can hardly be considered representative "of an average broadcast viewer."

thetical to the First Amendment. As this Court has repeatedly explained, "[u]nder our Constitution, 'esthetic and moral judgments about art ... are for the individual to make, not for the Government to decree.'" *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000)). Hence, "the Commission may not impose upon [broadcasters] its private notions of what the public ought to hear." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 650 (1994) (internal quotation marks omitted); *see also Pacifica*, 438 U.S. at 761 (Powell, J., concurring in part and concurring in the judgment). Government judgments about artistic merit or necessity also exacerbate the vagueness problem, as broadcasters cannot possibly predict which allegedly indecent material three commissioners will (often years later) deem artistically "essential" or "integral" to a particular broadcast, and hence not indecent.

In seeking review in this Court, petitioners asserted that the Commission already gives weight to broadcasters' reasonable artistic judgments when deciding whether to impose sanctions. *See* Pet. 22. However, the Commission has repeatedly stated that material it considers otherwise indecent may be deemed not indecent "where it is demonstrably *essential* to the nature of an artistic or educational work." *E.g.*, J.A. 90 (¶82) (emphasis added). What the Commission deems artistically "essential" is a far cry from deference to a licensee's "reasonable" judgment.

Petitioners respond (Br. 29) that "[a]ny perceived inconsistency in application of ... an 'artistic necessity' exception ... has no relevance to any as-applied vagueness challenge that Fox could plausibly assert here." That says nothing about the vagueness challenge

brought by ABC, which has argued throughout this case that the brief use of nudity in the relevant scene was an appropriate artistic judgment. Nor does it address the Second Circuit's analysis of the indecency policy generally.

In sum, the Commission's current approach to indecency enforcement appears driven by its own regard for the merits of the particular broadcast at issue, in each case reaching its desired result by adjusting the weight it gives to the three patent-offensiveness factors and other, often undefined "contextual considerations." *See* Pet. App. 24a. In the end, broadcasters know only that material will be deemed "indecent" when at least three commissioners find it "patently offensive." That presents all the dangers of vagueness: it deprives broadcasters of fair notice and impermissibly leaves enforcement susceptible to the subjective tastes of individual officials and to the pressures of advocacy group campaigns. *See, e.g.*, *Gooding* v. *Wilson*, 405 U.S. 518, 528 (1972); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988); *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 685-686 (1968). The result is that broadcasters steer far clear of the prohibited zone, notwithstanding that the Constitution requires that the benefit of the doubt be given to speech, not censorship.

2. Petitioners predict (Br. 36) that the vagueness inherent in the Commission's indecency-enforcement regime "is unlikely to foreclose a substantial amount of broadcast speech." Notably, petitioners ignore the Second Circuit's discussion of record evidence documenting the chilling effect the regime has already had. *See* Pet. App. 31a-34a. As the court of appeals explained, broadcasters have declined to air programs precisely because they could not predict with any confidence how the

Commission—perhaps years later—would apply its indecency test to those particular programs.

Indeed, "the absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature." Pet. App. 34a. For example, "several CBS affiliates declined to air the Peabody Award-winning '9/11' documentary, which contains real audio footage—including occasional expletives—of firefighters in the World Trade Center on September 11th." *Id.* at 31a. Similarly, "a radio station cancelled a planned reading of Tom Wolfe's novel *I am Charlotte Simmons*, based on a single complaint it received about the 'adult' language in the book, because the station feared FCC action." *Id.* Many ABC affiliates declined to air *Saving Private Ryan* precisely because of fears that the Commission might deem the broadcast indecent. *See, e.g.*, *Some Stations Won't Show 'Private Ryan,'* N.Y. Times, Nov. 11, 2004, at C6. And "Fox decided not to re-broadcast an episode of 'That 70s Show' that ... subsequently won an award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue." Pet. App. 33a-34a; *see also id.* at 32a-33a (news programming similarly chilled).

The chilling effect is magnified by the Commission's use of its draconian forfeiture authority. Under 47 U.S.C. §503(b)(2)(C)(ii), the Commission may now impose a fine of up to $325,000 for each violation of §1464. As part of its aggressive approach to indecency enforcement, the Commission, which previously construed this to be a per-broadcast limit, has reinterpreted it as a *per-station* limit. *See* Pet. App. 8a. Because network programs are frequently aired by scores of stations, forfeitures for a single broadcast

could easily run into the tens of millions of dollars. *Id.* These circumstances inevitably cause broadcasters to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (citation omitted).

Petitioners contend (Br. 31) that any vagueness concerns are ameliorated because the Commission has "declin[ed] to sanction broadcasters in cases," including *Fox*, "where it was not clear at the time of the broadcast that the FCC would regard the pertinent material as indecent." But *ABC* involves an inconsistent application of the indecency standard that (unlike in *Fox*) the Commission did *not* acknowledge. In *ABC*, the Commission imposed the maximum forfeiture despite the brevity of the nudity; the scene's lack of any sexual or excretory activity, or of any display of sexual interest by either character; ABC's use of a prominent advisory and V-chip ratings; and the fact that the scene was part of a serious, non-sexual storyline in a long-running, highly acclaimed, award-winning program. The only one of these mitigating factors the Commission even acknowledged in the forfeiture order was the advisory, which it brushed aside without explanation. *See* Pet. App. 183a (¶52).

Furthermore, as justification for imposing the maximum sanction, the Commission pointed to nothing more than the factors constituting the patent-offensiveness test and that the show was prerecorded. *See* Pet. App. 183a (¶52). Under this reasoning, the maximum forfeiture would be appropriate for *every* prerecorded show the Commission deemed to satisfy its indecency standard. That approach cannot reasonably be labeled "restrained." Indeed, it simply underscores the chilling effect of the Commission's vague indecency-

enforcement regime. *See NAACP* v. *Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter the[] exercise [of First Amendment rights] almost as potently as the actual application of sanctions.").

D. Petitioners' Remaining Vagueness Arguments Fail

1. Citing *HLP*, petitioners complain that because the court of appeals considered Commission decisions regarding broadcasts other than those at issue here, the court improperly converted an as-applied vagueness challenge into a facial one. But petitioners themselves invoked those decisions below in an effort to escape the force of *Reno*, arguing that the decisions provided guidance to broadcasters regarding what is indecent. *See* Pet. App. 23a. Indeed, petitioners invoke those decisions in this Court. *See* Pet. Br. 19, 33. Hence, if the Second Circuit had erred in considering other decisions, the error would have been an invited one.[14]

In any event, the Second Circuit properly considered those decisions. ABC is pursuing both an as-applied and a facial challenge, and in this context—

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[14] Petitioners are poorly situated to attack the *ABC* panel for "not consider[ing] the particular broadcast at issue but rel[ying] solely on the prior decision in *Fox*." Pet. Br. 18. Following the Second Circuit's decision in *Fox*, the *ABC* panel directed the parties to file supplemental briefs addressing *Fox*. Though stating that *Fox* and *ABC* involved "very different facts," petitioners asserted that *Fox* required invalidating the *ABC* forfeiture order. Gov't CA2 Supp. Br. 3. Petitioners asked only that the *ABC* panel withhold decision until after the disposition of any rehearing petition in *Fox*. *See id.* at 4. The panel proceeded exactly as petitioners suggested.

where ABC's own conduct is presumptively entitled to constitutional protection—the two kinds of challenges are not dramatically different. ABC can argue, and has argued, both that the Commission's policy failed to give it fair warning that its broadcast would be deemed indecent, and that it failed to give any broadcaster in its position fair notice of what would be considered indecent. The Commission's full corpus of decisions is relevant to both arguments. Contrary to petitioners' suggestion, this Court has not prohibited facial vagueness challenges; it has simply required that they be made by parties whose conduct was not "clearly proscribed." *Hoffman Estates*, 455 U.S. at 495. Because ABC's conduct was not clearly proscribed, the *ABC* panel appropriately relied on the *Fox* panel's analysis, including its examination of other Commission decisions.

In addition, *HLP* rested in significant part on the fact that the challenged statute implicated national-security concerns. "Congress and the Executive," this Court stated, "are uniquely positioned to make principled distinctions" in that area. 130 S. Ct. at 2728. This was different, the Court elaborated, from cases like *Cohen* v. *California*, 403 U.S. 15 (1971), in which "the application of the statute turned on the offensiveness of the speech at issue," *HLP*, 130 S. Ct. at 2728. That is precisely the context here. And in that context, the Court reiterated, "'governmental officials *cannot* make principled distinctions.'" *Id.* (emphasis added) (quoting *Cohen*, 403 U.S. at 25). *HLP* thus reaffirmed that the Constitution normally does not tolerate subjective government choices about what speech can be punished as offensive.

2. Petitioners also contend that ABC's argument regarding inconsistent and contradictory Commission precedent evinces a "hostility to the FCC's longstand-

ing context-based approach." Cert. Reply 7. This is incorrect. The contextual approach approved in *Pacifica* allows the Commission to treat broadcasts differently when they *are* different in regard to specific factors that the Commission has previously announced to be relevant. But what *Pacifica* did not authorize—and the Constitution does not permit—is a regime in which (1) the Commission declares that certain factors are relevant, but then (2) applies *those factors* inconsistently from broadcast to broadcast, and (3) simultaneously makes indecency findings that depend both on other (unannounced) factors, *see* Pet. App. 46a & n.35 (¶15), and on an opaque "balancing" of factors in a highly conclusory fashion, *see id.* at 138a-139a (¶12).

3. Petitioners point to the fact that the Commission's indecency policy applies only to broadcast licensees, and also argue that broadcasters can address any vagueness by airing possibly indecent material only during the late-night safe harbor. *See* Pet. Br. 34-36. This Court long ago rejected the former point, stating that "[t]he vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing." *Interstate Circuit*, 390 U.S. at 683.

As to the latter argument, petitioners cite no authority holding that the "channeling" of protected expression is relevant to a vagueness challenge, *i.e.*, that government can engage in vague regulation of speech so long as the vague regulation applies only some of the time. Petitioners also vastly understate the extent to which their safe-harbor suggestion would limit broadcasters' speech. The safe harbor runs from 10 pm to 6 am. Most people are asleep during those hours, and many of those who are awake are not watching television. The safe harbor also excludes most of "prime-time"—indeed, in the Central and Mountain Time zones

it excludes *all* of that highly desirable broadcast period. The channeling petitioners suggest would thus drastically curtail broadcasters' ability to communicate lawfully both with adults and with minors whose parents do not object to their children viewing the relevant material. It is therefore an insufficient response to the policy's vagueness. *See Interstate Circuit*, 390 U.S. at 688-689.[15]

4. Petitioners also repeatedly invoke (Br. 18, 28, 34) the networks' internal standards and practices regarding the airing of expletives. But expletives (and nudity) are only two among many categories of material the networks carefully review before airing. Depictions of violence and substance abuse, and of sensitive or controversial issues, are all reviewed to determine whether, given the material's content, context, and the time and manner of its presentation, it is appropriate for broadcast. *See* ABC Response to FCC Notice of Apparent Liability 4-5 (Feb. 11, 2008) (C.A.J.A. 186-187). The fact that certain materials are reviewed, and presented with particular ratings and advisories, by no means establishes that the material is "generally offensive to the viewing audience," Pet. App. 61a (¶30), or "not consistent with contemporary community standards," *id.*, *quoted in part in* Pet. Br. 28. To the contrary, broadcasters' internal standards and practices demonstrate the degree to which broadcasters seek to be responsive to their audience's tastes and sensitivities. More generally, petitioners provide no authority for the notion that a person's or entity's voluntary

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[15] *Interstate Circuit* also makes clear that indecency regulation's purpose of protecting minors is irrelevant to the vagueness analysis. *See* 390 U.S. at 689.

choice not to engage in particular constitutionally protected conduct authorizes government prohibition. That logic would, for example, allow the government to bar many newspapers from printing expletives simply because as a matter of editorial judgment they generally refrain from doing so.

5. Finally, petitioners' discussion (Br. 35) of an alternate indecency regime involving "an exhaustive list of words or images that are prohibited regardless of context" is a red herring. Petitioners' unstated premise is that such a regime is the *only* permissible alternative under the Second Circuit's vagueness holding. But the court did not foreclose the use of context. Rather, it merely prohibited the Commission from invoking "context" as an empty mantra in case after case to justify starkly inconsistent decisions. *See* Pet. App. 30a. The Second Circuit decision in no way prevented the Commission from articulating and applying, in a consistent and restrained fashion, rules and policies that not only provide broadcasters with constitutionally adequate guidance but also comport—as we now explain—with First Amendment requirements regarding the availability of less-restrictive alternatives and broad deference to broadcasters' editorial and artistic decisions.

II. THE FCC'S INDECENCY-ENFORCEMENT POLICY VIOLATES THE FIRST AMENDMENT

In recent Terms, and in a variety of contexts, this Court has reaffirmed the importance and robustness of First Amendment rights, rejecting an array of government efforts to restrict the freedom of expression. *See Brown*, 131 S. Ct. at 2741-2742; *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1220 (2011); *United States* v. *Stevens*, 130 S. Ct. 1577, 1592 (2010); *Citizens United* v. *FEC*, 130 S. Ct. 876, 898-899 (2010). The Court should do so

again here. The Commission's indecency finding against ABC, and its current indecency regime generally, are inconsistent with core First Amendment principles.

A. *Pacifica* Does Not Allow The Government To Prohibit The Scene At Issue Here

Even as construed in *Pacifica*, the First Amendment does not allow the government to proscribe the seven-second non-sexual display of buttocks at issue here.

1. Speech may constitutionally be regulated as indecent only if it genuinely has the capacity to threaten the "physical and psychological well-being of minors." *Sable*, 492 U.S. at 126. This Court has found that test met in very limited circumstances, primarily where the material was highly sexualized. For example, the Court allowed regulation of the sale to minors of certain pornographic magazines. *See Ginsberg* v. *New York*, 390 U.S. 629, 641-643 (1968). But it struck down an ordinance that banned films containing nudity from outdoor theaters—rejecting a protection-of-children rationale—partly because "[t]he ordinance is not directed against sexually explicit nudity." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 (1975).

A second factor the Court has considered in deciding whether indecent material may be regulated is the material's duration, *i.e.*, how long children could be exposed to it. In *Erznoznik*, for example, a second reason the Court gave for striking down the ordinance was that it "sweepingly forbids ... films containing any uncovered buttocks ..., irrespective of ... pervasiveness." 422 U.S. at 213. Similarly, in *Playboy* the Court struck down a statute regulating highly sexual cable-television programs after noting that the law reached material

"as fleeting as an image appearing on a screen for just a few seconds." 529 U.S. at 819.

Both of these factors were considered in *Pacifica*, where the Court upheld the application of §1464 to a lengthy broadcast in which expletives infused with sexuality were "repeated over and over" for almost twelve minutes. 438 U.S. at 757 (Powell, J., concurring in part and concurring in the judgment). And the concurrence stressed that "certainly the Court's holding today[] does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-761. *Pacifica* thus does not justify the Commission's ruling that the brief and non-sexual nudity here could be punished as indecent. Indeed, this case raises all the constitutional concerns that the Court, and Justice Powell's concurrence, expressed about extending indecency regulation beyond narrow bounds.

Nor has the Commission explained how viewing the scene in question could harm children. The Court in *Pacifica* suggested that hearing the Carlin monologue could "enlarge[] a child's vocabulary." 438 U.S. at 749. But even if that is true, there is no analogous consequence here. Every child has seen buttocks (presumably for longer than seven seconds), and children could learn nothing about sex or excretion from the scene because it contains nothing on those topics. The scene is neither sexual nor vulgar; it instead depicts the embarrassment visited on both characters by this unanticipated event. The First Amendment does not allow governmental proscription of material when the Commission itself cannot articulate how its viewing could harm children. *See Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 766 (1996) (plurality opinion) ("[Absent] a factual basis substantiating the harm[,] ... we cannot assume that the harm exists.").

2. Petitioners respond (Br. 38) that in *Pacifica* this Court held that "prurient appeal" was not an element of indecency, and upheld the indecency finding against the Carlin monologue. But the Carlin monologue had an undeniable sexual element. "Fuck" was used pervasively in the monologue, and specifically in the sexual sense. *See Pacifica*, 438 U.S. at 754 ("We're going to make love, yeh, we're going to fuck ...."). Other portions of the monologue were similarly infused with sexual connotations. *See, e.g., id.* at 755. Under the Commission's own precedent, which views every use of "fuck" and its variants as inherently sexual, *see* J.A. 121 (¶138), there is no serious argument that the monologue was not sexualized.

In any event, because the monologue was over 100 times longer than the nudity here, petitioners' argument does nothing to justify the prohibition of a broadcast that meets *neither* of the factors this Court has deemed relevant, *i.e.*, that was neither sexualized nor contained prolonged mature material. Such a broadcast cannot constitutionally be prohibited—certainly not when the broadcaster takes concrete steps to empower parental control and when the relevant material is part of a serious, non-sexual storyline in a highly acclaimed dramatic series.[16]

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[16] Petitioners claim (Br. 38) that this argument "logically suggests" that broadcasters could air "gratuitous full frontal nudity, provided that they do so in intermittent bursts of fewer than seven seconds." But whether any broadcast is indecent is evaluated in light of the broadcast as a whole and its overall context. *See Industry Guidance*, 16 F.C.C.R. at 8002-8003 (¶9). A program containing extended nudity, whether in one long shot or many "intermittent bursts," is (though not necessarily indecent) a far cry from

Petitioners argue that they are not required to offer "'scientific' proof" (Br. 38) that this broadcast could have harmed children. But this Court has required the government at least to explain why the broadcast is harmful. Indeed, this Court has repeatedly stated that even when restricting commercial speech (where strict scrutiny is not currently applied), the government "must demonstrate that the harms it recites are real." *E.g.*, *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 188 (1999) (internal quotation marks omitted). Perhaps one could articulate that exposure to images of sexual behavior (or of body parts unique to one gender) could teach a child about a subject for which the child is not developmentally prepared. But petitioners have never explained what harm children might suffer from seeing a woman's buttocks for seven seconds in a non-sexual context. Even applying the reduced scrutiny applicable under *Pacifica*, that total failure confirms the constitutional infirmity of the Commission's indecency finding.

B. The V-Chip Precludes Indecency Regulation Of Rated Programs

When *Pacifica* was decided, parents had no way to block particular programs from being viewed on their television sets. Today, the V-chip and similar blocking technologies provide parents with powerful tools to block broadcasts they deem objectionable for their children's viewing. The advent of this technology significantly alters the constitutional calculus, for the First Amendment prohibits content-based restrictions on

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one that contains seven seconds of nudity *in total* (out of an hour-long program).

protected expression if a reasonably effective, less-restrictive means of achieving the government's objective is available. That is the situation as to broadcasts like the *NYPD Blue* episode at issue here. In light of the nearly universal adoption of blocking technology, the regulation of indecency upheld in *Pacifica* must, at a minimum, be reconsidered as to blockable programs.

1. The Commission explained long ago that the government interest underlying its broadcast-indecency regulation is supporting the decisions of parents who do not want their children to see or hear indecent material. *See, e.g., Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1343-1344 (D.C. Cir. 1988).[17] But the V-chip and similar technologies are an effective way to further that interest that is far less restrictive, and far less overinclusive, than the Commission's proscription of broadcast material it deems "indecent."

The V-chip allows viewers to block television programs based on their rating, which specifies both a program's overall age-appropriateness, from "TV-Y" for children's shows to "TV-MA" for adult programming, and its particular content, such as "intense vio-

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[17] Any asserted government interest in overriding parents' decisions that their children need not be shielded from material the Commission deems indecent (*e.g.*, Pet. Br. 23) is constitutionally illegitimate. *See, e.g., Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (labeling "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court"); *cf. Brown*, 131 S. Ct. at 2741 (suggesting government may not restrict sales of violent videogames to children whose "parents [do not] *care* whether they purchase" those games, because such a restriction "is only in support of what the State thinks parents *ought* to want").

lence (V)" or "strong coarse language (L)." FCC V-Chip, *supra* n.2. The Commission itself has stated that this technology "will give parents the tools they need to limit the exposure of their children to video programming that they believe is inappropriate." *Implementation of Section 551 of the Telecommunications Act of 1996*, 13 F.C.C.R. 8232, 8243 (¶24) (1998). Congress has likewise labeled the V-chip "a nonintrusive and narrowly tailored means of achieving th[e] compelling governmental interest [in promoting parental authority]." Telecommunications Act of 1996, Pub. L. No. 104-104, §551(a)(9), 110 Stat. 56, 140.[18] Furthermore, with the 2009 switch to all-digital transmission of television signals, virtually every functioning television in America has a V-chip or equivalent blocking technology. *See, e.g., Implementation of the Child Safe Viewing Act*, 24 F.C.C.R. 11413, 11418-11419 & n.20 (¶11) (2009) (*CSVA*).

Under these circumstances, content-based restrictions on blockable programs are impermissible. As the Court has explained, "if a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Playboy*, 529 U.S. at 815. Consistent with that mandate, the Court has repeatedly struck down content-based speech restrictions where a less-restrictive blocking or filtering alternative was (or even might have been) available. *See id.* ("[T]argeted blocking ... support[s] parental authority without affecting the First Amendment interests of speakers and willing listeners."); *Ashcroft* v. *ACLU*,

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[18] This legislative judgment, in particular, "gravely weaken[s]" the Commission's rationale for indecency regulation of blockable broadcasts. *Boos* v. *Barry*, 485 U.S. 312, 329 (1988).

542 U.S. 656, 666-668 (2004); *Reno*, 521 U.S. at 876-879; *Denver Area*, 518 U.S. at 756, 758; *Sable*, 492 U.S. at 128-131. The same result is warranted here.

That these cases did not involve broadcasting, which under *Pacifica* receives reduced First Amendment protection, is immaterial. This Court has made clear that content-based restrictions on broadcasters' expression must be narrowly tailored. *See FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984) (citing cases). That requirement is not met here. The V-chip—which is much more effective and more widely available than the technologies in the cases just cited—restricts far less expression than indecency regulation, and substantially accomplishes the government's goal of helping parents control what their children watch on television. Because "targeted blocking is a feasible and effective means of furthering its compelling interests," the government "cannot ban speech." *Playboy*, 529 U.S. at 815.

The Commission's regime is also "vastly overinclusive," *Brown*, 131 S. Ct. at 2741. It prohibits constitutionally protected expression from reaching minors whose parents do not believe their children need to be shielded from material the Commission deems indecent. *See id.* And it applies to all adults, even though roughly *two-thirds* of the 115 million television households in America do not include any children under age 18 and nearly three-quarters (more than 83 million homes) have no children under age 12. *See Nielsen National Universe Estimates* (data effective as of Aug. 29, 2011).[19] Although overinclusiveness existed when

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[19] The Nielsen database that generated this figure and the database that generated the figures that follow, *see infra* pp.52-53,

Pacifica was decided, there was no viable alternative. Now there is.

2. Like the Commission below, *see* Pet. App. 177a-179a (¶47), petitioners stress (Br. 49-51) supposed limitations of the V-chip. None of those points has merit.

a. First, petitioners contend (Br. 51) that "only between 5% and 16% of all parents use the V-Chip," and attribute that ("perhaps") to findings that 57% of parents said they were "'not aware that they have a V-chip'" or that "'many'" parents found the process of using the V-chip complicated. This Court has rejected similar arguments regarding other blocking technologies, holding that those technologies were constitutionally preferred alternatives even though relatively few people knew about or chose to use them. As the Court explained in *Denver Area*, for example, when customers do not know of a device or how to use it, the proper remedy is to better inform them. *See* 518 U.S. at 758-759. And in *Playboy*, the Court held that the government cannot rely simply on lack of awareness, but must prove that a less-restrictive alternative would not be effective *even if* people knew about it and how to use it. *See* 529 U.S. at 816; *see also id.* at 816-826. No such showing has even been attempted here.

b. Petitioners next assert (Br. 51) that "most of the televisions in use at the time of the broadcasts at issue did not have" a V-chip. But this Court has made clear that market saturation is not a prerequisite of a less-restrictive alternative. In *Reno*, for instance, the

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are available for purchase. Pursuant to Rule 32.3, a letter seeking leave to lodge the relevant analyses was submitted to the Clerk on November 3, 2011.

Court pointed to filtering software that was not yet widely available. *See* 521 U.S. at 877. And in *Sable*, the Court relied on the *untested possibility* that companies would be able to successfully verify callers' ages using technologies such as access codes and scramblers. *See* 492 U.S. at 128-131. Any limits on the availability of the V-chip in 2003 thus do not justify the content-based restriction applied in the forfeiture order.

c. Petitioners also note (Br. 51) that because some categories of programs are not rated, not all programs can be blocked by V-chips. *See also* Pet. App. 178a (¶47) (news and sports programs are not rated). That provides no basis to allow content-based restrictions of television programs that *are* rated—such as the *NYPD Blue* episode here.

d. Finally, petitioners assert (Br. 50) that many programs are "inaccurately rated." But petitioners' most recent supporting authority is years old, *cf. Playboy*, 529 U.S. at 820-821, and in any event the possibility of ratings that some may deem inaccurate cannot justify an indecency finding where, as here, the broadcaster rated the show accurately. Indeed, petitioners do not contend otherwise, instead shifting to the argument (Br. 51) that the episode's rating "would not have apprised viewers employing the V-Chip system that nudity would be aired."[20] That argument fails for several reasons.

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[20] The Commission did argue below that the episode was misrated, in that ABC did not include an "S" descriptor. *See* Pet. App. 178a-179a (¶47). But for TV-14-rated programs, "S" denotes "intense sexual situations." *See* FCC V-Chip, *supra* n.2. Because the episode contained no sexual situations, let alone intense ones, including that descriptor would have misrated the show.

As an initial matter, ABC's prominent viewer advisory—which appeared roughly *30 seconds* before the scene at issue—explicitly noted the episode included nudity. The episode was also rated TV-14, which both strongly cautioned parents about the program's material and allowed them to block the episode using just that rating, without regard to content descriptors. And the reason there was no specific nudity descriptor for the show is the Guidelines—which were expressly approved by the Commission—do not include such a descriptor. Indeed, the Commission *rejected* calls that it include more detailed descriptors, concluding that the Guidelines were "sufficient to advise parents" about potentially objectionable material. *Implementation of Section 551*, 13 F.C.C.R. at 8242 (¶20). Perhaps the rating system could be revised, but petitioners cannot complain about broadcasters' adherence to a ratings system that the Commission expressly approved as "meet[ing] the goal[]" of "provid[ing] parents with information necessary to make informed decisions." *Id.*

More generally, petitioners' argument that the V-chip is an inadequate alternative because some programs may be inappropriately rated has no basis in this Court's precedent. To the contrary, in holding just last Term that a voluntary rating system for violent videogames provided a less restrictive alternative to government regulation, this Court recognized that there would be some "gap" in keeping objectionable material out of the hands of minors, but held that "[f]illing the remaining modest gap in concerned-parents' control" could not justify a government ban. *Brown*, 131 S. Ct. at 2741. Similarly, in *Playboy* the Court rejected restrictions on much more explicit sexual programming despite acknowledging that "under a voluntary blocking regime, even with adequate notice, some children

will be exposed to signal bleed," *i.e.*, to explicit sexual images. 529 U.S. at 826. In short, this Court has never held that less-restrictive alternatives must achieve the perfection petitioners demand in order to foreclose government censorship.[21]

C. Broadcast-Indecency Regulation Should Be Subject To Strict Scrutiny

The foregoing arguments explain why the Second Circuit's judgment should be affirmed even assuming that broadcast-indecency regulations are subject to the reduced scrutiny approved in *Pacifica*. That case, however, should be overruled, because time and technology have rendered its factual predicates obsolete. *See Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 855 (1992) (overruling precedent is appropriate if its "premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable"). Content-based restrictions on broadcasters' expression are thus properly subject to the strict scrutiny that applies to every other medium, including cable, satellite, and the Internet. *See generally Fox*, 129 S. Ct. at 1819-1822 (Thomas, J., concurring). Petitioners do not even argue that the indecency findings here would survive such scrutiny.

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[21] Notably, the Court in *Playboy* also pointed out that "[t]ime channeling, unlike blocking, does not eliminate signal bleed around the clock," 529 U.S. at 826, and hence that channeling would leave open the possibility of children being exposed to signal bleed during the unregulated times of day, *see id.* The Court recognized, in other words, that in terms of supporting parental control over what their children see and hear, blocking technology is in some ways superior to the channeling that petitioners espouse here.

1. Petitioners first defend (Br. 42) relaxed scrutiny of indecency regulation on the theory of "spectrum scarcity," *i.e.*, that there are "more would-be broadcasters than frequencies available in the electromagnetic spectrum." That argument lacks merit.

Although this Court relied (more than three decades ago) on spectrum scarcity to justify reduced First Amendment scrutiny of certain broadcast regulations, *see Red Lion*, 395 U.S. at 386-396, it has never suggested that spectrum scarcity justified *indecency* regulations. To the contrary, the Court expressly stated in *Pacifica* that of the various possible reasons for reduced First Amendment scrutiny in the broadcast context, only "two have relevance to the present case," 438 U.S. at 748—and those two were broadcasting's posited unique pervasiveness and unique accessibility to children, *see id.* at 748-750; *see also id.* at 770 n.4 (Brennan, J., dissenting) ("The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of 'spectrum scarcity[.]'").[22] The Commission itself has repeatedly recognized this limitation in *Pacifica*, *see, e.g.*, Pet. App. 78a (¶47), and has itself "expressly rejected" scarcity as a rationale for indecency enforcement, *Infinity*, 3 F.C.C.R. at 930 n.11 (¶3); *see also Pacifica Found.*, 2 F.C.C.R. at 2699 (¶15). Unsurprisingly, the Commission's orders here made no effort to justify its regulation on spectrum-scarcity grounds.

The Court's and the Commission's longstanding decision not to rely on spectrum scarcity in this context makes sense. Whatever its merits, the scarcity ration-

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[22] Petitioners assert (Br. 4) that *Pacifica* referred to these two factors as having "particular" relevance, implying that others had some relevance. That qualifier appears nowhere in *Pacifica*.

ale is based on the theory that scarcity might prevent the public from receiving speech on a sufficiently wide variety of subjects or viewpoints, and that in certain contexts the public has an interest in access to such diversity. *See Red Lion*, 395 U.S. at 389-392. But that public interest provides no basis for indecency restrictions because prohibiting the airing of indecent material does nothing to ensure that the public receives diversity in any sort of programming.[23] Indeed, in *Red Lion* the Court stressed that "[t]here is no question here of the Commission's refusal to permit the broadcaster to carry a particular program." *Id.* at 396.[24]

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[23] Petitioners also argue (Br. 44) that in exchange for access to a scarce public resource broadcasters must accept "content-based restrictions that could not be imposed on other communications media." *Red Lion*, however, upheld only the Commission's power to make room for speech on a broader range of topics, not to prohibit speech, *see* 395 U.S. at 386-401—a distinction underscored by Congress's judgment to bar the Commission from censoring broadcasters, 47 U.S.C. §326.

[24] Invoking the scarcity rationale now would be particularly unwarranted because developments in recent decades have rendered it untenable. *See Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring). Six years ago a detailed FCC staff analysis explained that in light of the explosion in the number of cable, Internet, and other media outlets, "[b]y no rational, objective standard can it still be said that ... channels for broadcasting are scarce." Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting* 18 (Mar. 2005), *available at* http://www.fcc.gov/ownership/materials/already-released/scarcity030005.pdf (visited Nov. 2, 2011). In 1984, this Court indicated a willingness to reconsider the spectrum scarcity rationale upon receiving "some signal from ... the FCC that technological developments" make such reconsideration appropriate. *League of Women Voters*, 468 U.S. at 377 n.11. The Commission has since provided such a signal: In addition to issuing the staff report just cited, it has stated that "we no longer believe that there is scarcity in the number of broadcast

2. Petitioners also invoke (Br. 44-47) *Pacifica*'s assertion that reduced First Amendment scrutiny of indecency regulation is appropriate because broadcasting is "uniquely pervasive" and "uniquely accessible to children," 438 U.S. at 748, 749. Whatever force that justification had 33 years ago, broadcast television is now neither uniquely pervasive nor uniquely accessible to children. Approximately 87 percent of American households currently subscribe to cable, satellite, or telephone-company-provided television services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, 546 (¶8) (2009); Nielsen, *State of the Media: The Cross-Platform Report, Quarter 1, 2011*, at 8.[25] These services bring dozens (often hundreds) of non-broadcast television channels into people's homes to the same extent—and with the same accessibility to children—as broadcast television. *See Denver Area*, 518 U.S. at 744-745 (plurality opinion). Indeed, with many such services there is no obvious difference to viewers between broadcast and non-broadcast channels: Broadcast channels are interspersed among non-

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outlets available to the public." *Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043, 5054 (¶74) (1987) (subsequent history omitted), *abrogated on other grounds, Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19973, 19979-19980 (¶¶16-18) (2000). In the years since that pronouncement, moreover, the number of broadcast television channels available to the public has continued to increase, particularly with the recent change to digital broadcasting. *See Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring). If spectrum scarcity is now necessary to support the Commission's indecency-enforcement policy, reliance on it should be rejected and *Red Lion* overruled.

[25] *Available at* http://www.slideshare.net/sumitkroy/nielsen-crossplatformreport-for-us-2011-data (visited Nov. 2, 2011).

broadcast channels and nothing about the way the consumer engages with the televised media makes those channels uniquely pervasive. Similarly, "[t]he internet ... has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs." Pet. App. 15a (citing *CSVA*, 24 F.C.C.R. at 11468 (¶126)).

Petitioners' responses (Br. 44-45) are unpersuasive. They first focus on the small percentage of households that receive television only through broadcast signals. Some of these homes, however, undoubtedly have Internet service, which as just explained provides access to television programs. More fundamentally, the vanishingly remote difference that now exists between the pervasiveness of broadcast television and that of other forms of video programming does not justify curtailment of one of Americans' most fundamental and important constitutional rights. *Cf. Brown*, 131 S. Ct. at 2741 n.9 ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced.").

Petitioners also note that many households with cable or satellite service still watch broadcast programs, and that those programs are among the most popular on television. But saying that broadcast programs are popular is not the same as saying that broadcast channels are *by their nature* uniquely pervasive. And there is no basis to argue that under the First Amendment, the more popular a media outlet is the more amenable it is to government regulation. In any event, total primetime viewership for cable-originated programming (*i.e.*, cable television programming excluding cable-carried broadcast signals) now exceeds total primetime viewership of broadcast-originated programming (including broadcast signals delivered by

cable), particularly among minors. *See Nielsen Media Research—Galaxy Explorer & Npower—Live+7 Data Stream*, *supra* n.19. In the 2010-2011 television season, on average, more than twice as many viewers aged 2-17 watched cable-originated programming as watched broadcast-originated programming during primetime. *Id.*

Finally, petitioners' arguments are unmoored from *Pacifica*'s rationale. The Court's focus there was on the fact that broadcasts "confront[] the citizen ... in the privacy of the home." 438 U.S. at 748; *see also id.* at 749 n.27. The same is true of the other media outlets discussed above.

As for unique accessibility to children, petitioners argue (Br. 46-47) that this factor endures because the "availability [of broadcast programming] ... does not depend on any affirmative conduct by ... parents beyond the initial acquisition of a television or radio." In fact, the steps that must be taken to acquire broadcast television versus other forms of television are essentially identical. For television signals to be accessible to their children, parents must (1) buy a television, (2) bring it home, and (3) *either* install cable, satellite, or similar television services, *or* set up an antenna or some other means of making receipt of broadcast signals feasible. Here, too, *Pacifica* confirms the infirmity of petitioners' argument: It distinguished broadcasting from media inaccessible to children "too young to read" and from media that "may be withheld from the young without restricting the expression at its source." 438 U.S. at 749. Applying these criteria confirms that broadcasting is not uniquely accessible to children compared to many other media, particularly other television services.

Petitioners also point out that some children have a television set in their rooms and that some of those televisions do not have cable or satellite connections. But the fact that some parents *choose to allow* their children to have televisions in their bedrooms cannot justify government regulation barring protected speech from televisions across many millions of homes, including homes in which parents exercise greater parental control, and homes with no children at all.

Petitioners' focus on "unique accessibility" suffers from an even more fundamental infirmity. For much of television history—including at the time of *Pacifica*—parents possessed no effective way to block broadcast programs or channels. *Playboy*, 529 U.S. at 815 (recognizing this as a "key difference between cable television and the broadcasting media"). The advent of the V-chip and similar technologies, however, has rendered that fact obsolete, and with it any argument that "the ease with which children may obtain access to broadcasts ... justifie[s] [the] special treatment of indecent broadcasting," *Reno*, 521 U.S. at 866-867 (discussing *Pacifica*).[26]

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[26] Petitioners also quote *Pacifica*'s statement that "each medium of expression presents special First Amendment problems," 438 U.S. at 748. In support of that statement, *Pacifica* cited *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952). What the Court said in *Joseph Burstyn*, however (and what it repeated just last Term), was that "[e]ach method [of expression] tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, *do not vary*. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." *Id.* at 503 (emphasis added), *quoted in part in Brown*, 131 S. Ct. at 2733.

Put simply, then, "[t]he extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment ... do not exist today." *Fox*, 129 S. Ct. at 1822 (Thomas, J., concurring). That provides the "special justification" (Pet. Br. 41) required to overrule a constitutional decision like *Pacifica* (and, if necessary, *Red Lion*). Indeed, as this Court recently recounted, it has previously overruled decades-old precedent that had approved reduced First Amendment scrutiny of content-based restrictions—justified by a harm theory—for a particular medium of expression. *See Brown*, 131 S. Ct. at 2737 ("For a time, our Court did permit broad censorship of movies because of their capacity to be 'used for evil,' *see Mutual Film Corp.* v. *Industrial Comm'n of Ohio*, 236 U.S. 230, 242 (1915), but we eventually reversed course, *Joseph Burstyn, Inc.*, 343 U.S., at 502."). No less is required here.

3. Petitioners assert (Br. 47-49) that the rise of other media actually supports continued unique disfavoring of broadcasters. They contend in particular that these media offer broadcasters other outlets for expression and that technological advances further reduce the burden by allowing expletives to be "bleeped" without "adulterating the content of a broadcast." The First Amendment, however, does not tolerate government censorship of one medium of expression because the speaker may be able to rely on another. Relegating broadcasters to other media significantly limits the extent of their ability to communicate with others. As for "bleeping," the Commission has recognized that the bowdlerization of artistic works can "alter[] the nature of the artistic work and diminish[] the power, realism and immediacy of the ... experience for viewers." *Saving Private Ryan*, 20 F.C.C.R. at 4513 (¶14). That is no less true if non-sexual nudity is blurred in a properly

rated episode of a dramatic series prized for its realistic portrayal of serious storylines.

Petitioners also quote (Br. 49, 52) this Court's statement in *Fox* that the growth of other media could justify the Commission's decision to regulate broadcasters more strictly "so as to give conscientious parents a relatively safe haven for their children." 129 S. Ct. at 1819. That statement was made in a discussion of administrative law. It is not reasoning this Court has ever embraced as a principle of the First Amendment, which cannot possibly countenance the government singling out one group of speakers because of the content or quantity of others' expression. *Cf. Citizens United*, 130 S. Ct. at 898-899; *Brown*, 131 S. Ct. at 2740 (government regulation of videogames, absent similar regulation of other media accessible to children, "is wildly underinclusive ..., which in our view is alone enough to defeat it").

D. Petitioners' Historical Argument Lacks Merit

Petitioners conclude by arguing (Br. 51-53) that the long history of indecency regulation supports reversal. That argument also fails.

First, in making this argument petitioners offer various assertions (Br. 52-53) about "parents' settled expectations" and about what parents, broadcasters, and indeed, "millions of Americans" have "understood" about indecency regulation—all of which are supported by no evidence whatsoever. Such bald claims are wholly insufficient to justify content-based restrictions on constitutionally protected expression. Petitioners also wrongly imply (Br. 51) that affirmance would require this Court to hold "all broadcast indecency regulation ... to be prohibited by the First Amendment."

Although such a holding is one possible outcome, it is unnecessary for affirmance. Likewise flawed is petitioners' related prediction that a ffirmance would cause the broadcast airwaves to be overrun with "extremely graphic descriptions and images." *Id.* No such overrunning exists, or has ever existed, during the late-night "safe harbor," when indecency regulation unquestionably does not apply. *See* Pet. App. 60a-61a (¶29). That is partly because, as petitioners repeatedly note, the networks' own standards ensure that material that may have a powerful effect on viewers is carefully reviewed prior to being aired. There is no basis to expect that broadcasters would suddenly abandon those standards in the wake of any change in the extent of FCC regulation.

More to the point, petitioners are quite wrong to suggest (Br. 53) that the current indecency regime has an "80-plus-year" pedigree. Although indecency regulation was first authorized in the 1920s, there was almost no actual regulation for decades thereafter. *See* Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. Rev. L. & Soc. Change 49, 86-87 (1992). The Commission did not even issue its first indecency fine until 1970. *See In re WUHY-FM*, 24 F.C.C.2d 408, 416 (¶20) (1970). Even after *Pacifica*, there were no indecency-enforcement actions for almost a decade. *See Infinity*, 3 F.C.C.R. at 930 (¶4). Not until roughly ten years ago did the aggressive (and often inconsistent) form of indecency regulation under review in this case manifest itself. This history of restraint—and the resulting lack of thorough legal challenges to an aggressive enforcement regime—belies any claim that the current regime enjoys a "'presumption'" of constitutionality (Pet. Br. 53), let alone that it has become part of our "'national culture'" (*id.* at 52).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JOHN W. ZUCKER
ABC, INC.
77 West 66th Street
New York, N.Y. 10023
(212) 456-7387

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL S. VOLCHOK
SONYA L. LEBSACK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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RESPONDENT'S BRIEF

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In the Supreme Court of the United States

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Petitioners,

v.

FOX TELEVISION STATIONS, INC. ET AL.,
Respondents.

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Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF RESPONDENTS ABC TELEVISION AFFILIATES ASSOCIATION ET AL.

Wade H. Hargrove
Counsel of Record
Mark J. Prak
David Kushner
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
150 Fayetteville St., Ste. 1600
Raleigh, N.C. 27601
919.839.0300
whargrove@brookspierce.com

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[Additional Respondents Listed on Inside Cover]

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Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television, Inc., WSIL-TV, Inc., Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont, Inc., Duhamel Broadcasting Enterprises, Gray Television Licensee, Inc., KATC Communications, Inc., KATV, LLC, KDNL Licensee, LLC, KETV Hearst-Argyle Television, Inc., KLTV/KTRE License Subsidiary, LLC, KSTP-TV, LLC, KSWO Television Company, Inc., KTBS, Inc., KTUL, LLC, KVUE Television, Inc., McGraw-Hill Broadcasting Company, Inc., Media General Communications Holdings, LLC, Mission Broadcasting, Inc., Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting, Inc., NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television, Inc., Piedmont Television of Huntsville License, LLC, Piedmont Television of Springfield License, LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations, San Antonio, Inc., Scripps Howard Broadcasting Co., Southern Broadcasting, Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans, Inc., WAPT Hearst-Argyle Television, Inc., WDIO-TV, LLC, WEAR Licensee, LLC, WFAA-TV, Inc., WISN Hearst-Argyle Television, Inc.

Corporate Disclosure Statement

Pursuant to Sup. Ct. R. 29.6, Respondents make the following disclosures*:

ABC Television Affiliates Association is a non-profit trade association of approximately 160 television stations affiliated with the ABC Television Network and which represents its member stations before the FCC, Congress, and the courts. ABC Television Affiliates Association has issued no shares of stock or debt securities to the public and has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Cedar Rapids Television Company, licensee of Television Station KCRG-TV, Cedar Rapids, Iowa, is a direct, wholly-owned subsidiary of The Gazette Company. The Gazette Company, which is a privately-held corporation, has no parent company, and no publicly-held company owns more than 10% of its stock.

Centex Television Limited Partnership, licensee of Television Station KXXV(TV), Waco, Texas, is a limited partnership whose partners are KSWO Television of Texas, Inc. (which is wholly owned by KSWO Television Co., Inc.) and Lawton Cablevision, Inc., and no publicly-held company owns shares in any of the partners.

Channel 12 of Beaumont, Inc., former licensee of Television Station KBMT(TV), Beaumont, Texas, has

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* Respondents' names in bold are the names of the parties as they originally appeared below. Many Respondents have since undergone corporate restructurings. All relevant entities are included in these disclosures.

been dissolved. Channel 12 of Beaumont, Inc.'s sole shareholder was Texas Telecasting, Inc., which remains in existence and is a 100% subsidiary of Texas Television, Inc., which is a privately-held corporation, and no stockholder is a publicly-held company.

Citadel Communications, LLC, licensee of Television Station KLKN(TV), Lincoln, Nebraska, is a privately-held limited liability company. No member of Citadel Communications, LLC is a corporation. Citadel Communications Company, L.P., which is also a limited liability company, is the only member of Citadel Communications, LLC that is not a natural person, and only one interest holder in Citadel Communications Company, L.P.—C.C.C. Communications Corporation—is a corporation, and no stockholder of that corporation is a publicly-held company.

Duhamel Broadcasting Enterprises ("DBE"), licensee of Television Station KOTA-TV, Rapid City, South Dakota, is a privately-owned corporation, and no stockholder of DBE is a publicly-held company.

Gray Television Licensee, LLC (**f/k/a Gray Television Licensee, Inc.**), licensee of Television Station KAKE-TV, Wichita, Kansas, and licensee of Television Station KLBY(TV), Colby, Kansas, is a subsidiary of Gray Television Group, Inc., which is, in turn, a subsidiary of WVLT-TV, Inc. The corporate parent of WVLT-TV, Inc. is Gray Television, Inc., a publicly-held company traded on the New York Stock Exchange.

KATC Communications, Inc., licensee of Television Station KATC(TV), Lafayette, Louisiana, is a wholly-owned subsidiary of Cordillera Com-

munications, Inc. Cordillera Communications, Inc. is, in turn, a wholly-owned subsidiary of Evening Post Publishing Company ("Evening Post"). Evening Post is a privately-held company. No publicly-held company has a 10% or greater direct or indirect ownership interest in Evening Post or in KATC Communications, Inc.

KATV, LLC, licensee of Television Station KATV(TV), Little Rock, Arkansas, is a wholly-owned subsidiary of Allbritton Communications Company, which is, in turn, wholly-owned by Allbritton Group, LLC, which is wholly-owned by Perpetual Corporation. All of the shares of Perpetual Corporation are indirectly owned by or for the benefit of Joe L. Allbritton, Barbara B. Allbritton, and Robert L. Allbritton.

KDNL Licensee, LLC, licensee of Television Station KDNL-TV, St. Louis, Missouri, is an indirect wholly-owned subsidiary of Sinclair Broadcast Group, Inc., a publicly-held company traded on NASDAQ.

KETV Hearst Television Inc. (f/k/a **KETV Hearst-Argyle Television, Inc.**), licensee of Television Station KETV(TV), Omaha, Nebraska, is a wholly-owned subsidiary of Hearst Properties Inc., which is a wholly-owned subsidiary of Hearst Television Inc. Hearst Television Inc. is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

KLTV/KTRE License Subsidiary, LLC, licensee

of Television Station KLTV(TV), Tyler, Texas, is a wholly-owned subsidiary of KLTV/KTRE LLC, which is a wholly-owned subsidiary of TV-3, LLC, which is a wholly-owned subsidiary of Raycom TV Broadcasting, LLC, which is a wholly-owned subsidiary of Raycom TV Broadcasting, Inc. Raycom TV Broadcasting, Inc. is, in turn, owned by Raycom Media, Inc. and Liberty Corporation. Liberty Corporation is a wholly-owned subsidiary of Raycom Media, Inc. Raycom Media, Inc. is a privately-owned corporation, and no publicly-held company owns more than 10% of its stock.

KSTP-TV, LLC, licensee of Television Station KSTP-TV, St. Paul, Minnesota, is a wholly-owned subsidiary of Hubbard Broadcasting, Inc., which is a privately-owned corporation. No shareholder with 10% or greater interest in Hubbard Broadcasting, Inc. is publicly traded.

KSWO Television Co., Inc., licensee of Television Station KSWO-TV, Lawton, Oklahoma, is a privately-owned corporation, and no shareholder is a publicly-held company.

KTBS, LLC (f/k/a **KTBS, Inc.**), licensee of Television Station KTBS-TV, Shreveport, Louisiana, is a privately-owned limited liability company, and no interest holder is a publicly-held company.

KTUL, LLC, licensee of Television Station KTUL(TV), Tulsa, Oklahoma, is a wholly-owned subsidiary of Allbritton Communications Company, which is, in turn, wholly-owned by Allbritton Group, LLC, which is wholly-owned by Perpetual Corporation. All of the shares of Perpetual Corporation are indirectly owned by or for the benefit of Joe L.

Allbritton, Barbara B. Allbritton, and Robert L. Allbritton.

KVUE Television, Inc., licensee of Television Station KVUE(TV), Austin, Texas, is a direct, wholly-owned subsidiary of Belo Corp., a publicly-held company traded on the New York Stock Exchange.

McGraw-Hill Broadcasting Company, Inc., licensee of Television Station KMGH-TV, Denver, Colorado, is a wholly-owned subsidiary of The McGraw-Hill Companies, Inc., which is a publicly-held company traded on the New York Stock Exchange. No other publicly-held company has a 10% or greater direct or indirect ownership interest in McGraw-Hill Broadcasting Company, Inc. On October 3, 2011, The McGraw-Hill Companies entered into an agreement to sell its nine-station broadcasting group, including KMGH-TV, to Scripps Media, Inc. The transaction is subject to regulatory approvals and customary closing conditions.

Media General Communications Holdings, LLC, former licensee of Television Station WMBB(TV), Panama City, Florida, is a limited liability company the sole member of which is Media General Operations, Inc. Media General Operations, Inc. is a wholly-owned subsidiary of Media General Communications, Inc., which is, in turn, a wholly-owned subsidiary of Media General, Inc. ("Media General"). Media General is an independent, publicly-held company traded on the New York Stock Exchange. It has no parent companies. GAMCO Investors, Inc., a publicly-held company that trades on the New York Stock Exchange, indirectly owns more than 10% of Media General through its wholly-owned subsidiaries GAMCO Asset Management

Inc. and Gabelli Funds, LLC and through its majority-owned subsidiary Gabelli Securities, Inc.

Mission Broadcasting, Inc., licensee of Television Station KODE-TV, Joplin, Missouri, is a privately-owned corporation, and no shareholder is a publicly-held company.

Mississippi Broadcasting Partners, former licensee of Television Station WABG-TV, Greenwood, Mississippi, is a partnership whose 99% partner is Mississippi Telecasting Company, Inc. and whose 1% partner is Bahakel Broadcasting Company. Mississippi Telecasting Company, Inc. is a wholly-owned subsidiary of Greenwood Broadcasting Company, Inc. Greenwood Broadcasting Company, Inc. and Bahakel Broadcasting Company are both wholly-owned subsidiaries of Bahakel Communications, Ltd., which is a privately-held corporation, and no shareholder is a publicly-held company.

New York Times Management Services, former licensee of Television Station WQAD-TV, Moline, Illinois, was, prior to its dissolution, a Massachusetts Business Trust wholly owned by NYT Broadcast Holdings, LLC. The trustee of New York Times Management Services was NYT Group Services, LLC, which is a limited liability company, the sole member of which is The New York Times Company. NYT Broadcast Holdings, LLC is a limited liability company the sole member of which is NYT Holdings, Inc. NYT Holdings, Inc. is a wholly-owned subsidiary of NYT Capital, LLC, which is, in turn, a wholly-owned subsidiary of The New York Times Company. Until 2007, The New York Times Company indirectly owned nine television stations, including WQAD-TV, which

was licensed to New York Times Management Services. The New York Times Company has issued two classes of stock, Class A and Class B. The New York Times Company's Class A stock is publicly traded on the New York Stock Exchange. No publicly-held company has a 10% or greater direct or indirect ownership interest in The New York Times Company.

Nexstar Broadcasting, Inc., licensee of Television Station KQTV(TV), St. Joseph, Missouri, and licensee of Television Station WDHN(TV), Dothan, Alabama, is a wholly-owned subsidiary of Nexstar Finance Holdings, Inc., which is, in turn, a wholly-owned subsidiary of Nexstar Broadcasting Group, Inc. Nexstar Broadcasting Group, Inc. is a publicly-held company traded on the NASDAQ.

NPG of Texas, L.P., licensee of Television Station KVIA-TV, El Paso, Texas, is a wholly-owned subsidiary of NPG Holdings, Inc., which is a wholly-owned subsidiary of News-Press & Gazette Company. No shareholder is a publicly-held company.

Ohio/Oklahoma Hearst Television Inc. (f/k/a **Ohio/Oklahoma Hearst-Argyle Television, Inc.**), licensee of Television Station KOCO-TV, Oklahoma City, Oklahoma, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

Piedmont Television of Huntsville License, LLC, former licensee of Television Station WAAY-TV,

Huntsville, Alabama, was, prior to dissolution, a privately-owned limited liability company, and no shareholder was a publicly-held company.

Piedmont Television of Springfield License, LLC, former licensee of Television Station KSPR(TV), Springfield, Missouri, was, prior to dissolution, a privately-owned limited liability company, and no shareholder was a publicly-held company.

Pollack/Belz Communication Company, Inc., licensee of Television Station KLAX-TV, Alexandria, Louisiana, is a privately-owned corporation, and no shareholder is a publicly-held company.

Post-Newsweek Stations, San Antonio, Inc., licensee of Television Station KSAT-TV, San Antonio, Texas, is a wholly-owned subsidiary of Post-Newsweek Stations, Inc., which is a wholly-owned subsidiary of The Washington Post Company, a publicly-held company traded on the New York Stock Exchange.

Scripps Media, Inc., licensee of Television Station KNXV-TV, Phoenix, Arizona, is the successor through merger to **Scripps Howard Broadcasting Co.**, both companies being wholly-owned subsidiaries of The E.W. Scripps Company, a publicly-held company traded on the New York Stock Exchange.

Southern Broadcasting, Inc., licensee of Television Station WKDH(TV), Houston, Mississippi, is a privately-owned corporation, and no shareholder is a publicly-held company.

Tennessee Broadcasting Partners, licensee of Television Station WBBJ-TV, Jackson, Tennessee, is a partnership whose 99% partner is Jackson Telecasters, Inc. and whose 1% partner is Bahakel Broadcasting Company. Jackson Telecasters, Inc. and Bahakel

Broadcasting Company are both wholly-owned subsidiaries of Bahakel Communications, Ltd., which is a privately-held corporation, and no shareholder is a publicly-held company.

Tribune Television New Orleans, Inc., licensee of Television Station WGNO(TV), New Orleans, Louisiana, is a wholly-owned subsidiary of Tribune Broadcasting Company, which is a wholly-owned subsidiary of Tribune Company. All three companies are privately held, and no shareholder is publicly held.

WAPT Hearst Television Inc. (f/k/a **WAPT Hearst-Argyle Television, Inc.**), licensee of Television Station WAPT(TV), Jackson, Mississippi, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

WDIO-TV, LLC, licensee of Television Station WDIO-TV, Duluth, Minnesota, is a wholly-owned subsidiary of Hubbard Broadcasting, Inc., which is a privately-owned corporation. No shareholder with 10% or greater interest in Hubbard Broadcasting, Inc. is publicly traded.

WEAR Licensee, LLC, licensee of Television Station WEAR-TV, Pensacola, Florida, is an indirect wholly-owned subsidiary of Sinclair Broadcast Group, Inc., a publicly-held company traded on the NASDAQ.

WFAA-TV, Inc., licensee of Television Station WFAA-TV, Dallas, Texas, is a direct, wholly-owned

subsidiary of Belo Corp., a publicly-held company traded on the New York Stock Exchange.

WISN Hearst Television Inc. (f/k/a **WISN Hearst-Argyle Television, Inc.**), licensee of Television Station WISN-TV, Milwaukee, Wisconsin, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

WKOW Television, Inc., licensee of Television Station WKOW-TV, Madison, Wisconsin, is a wholly-owned subsidiary of Quincy Newspapers, Inc. ("QNI"). QNI is a privately-owned corporation, and no shareholder with 10% or greater interest is a publicly-held company.

WKRN, G.P., licensee of Television Station WKRN-TV, Nashville, Tennessee, is a general partnership whose general partners are Young Broadcasting of Nashville LLC ("Young Nashville") and YBT, Inc. ("YBT"). Young Nashville is a wholly-owned subsidiary of Young Broadcasting of Knoxville, Inc., which is a wholly-owned subsidiary of Young Broadcasting, LLC ("YBL"). YBT is also a wholly-owned subsidiary of YBL. The sole member of YBL is New Young Broadcasting Holding Co., Inc. ("New Young"). New Young is a privately-held company and no shareholder with 10% or more interest is publicly traded.

WSIL-TV, Inc., licensee of Television Station WSIL-TV, Harrisburg, Illinois, is a privately-owned

corporation, and no shareholder is a publicly-held company.

Young Broadcasting of Green Bay, Inc., licensee of Television Station WBAY-TV, Green Bay, Wisconsin, is a wholly-owned subsidiary of Young Broadcasting, LLC, the sole member of which is New Young Broadcasting Holding Co., Inc. ("New Young"). New Young is a privately-held company, and no shareholder with 10% or more interest is publicly traded.

Table of Contents

Corporate Disclosure Statement i

Table of Authorities xvi

Introductory Statement 1

Statement of the Case 3

Summary of Argument 13

Argument 17

I. *Pacifica* Both Establishes the Analytical Framework for Evaluating the Constitutionality of the Commission's Indecency Regime and Defines the Limits of Its Regulatory Authority 17

A. *Pacifica* Makes Clear That the Commission's Authority to Regulate Indecency Is Extremely and Necessarily Limited in Light of the First Amendment and Cannot Extend to the Proscription of Brief, Non-Sexual Nudity 18

B. *Pacifica* Was Predicated on the FCC's Commitment to a Restrained Indecency Enforcement Regime That the Commission Has Now Abandoned 23

II. The FCC's Indecency Enforcement Regime Is Unconstitutionally Vague 27

A. *Reno* Establishes the Vagueness of the FCC's Generic Definition of Indecency 29

B. Consideration of Context Does Not Justify the Inconsistent and Unpredictable Decisionmaking Reflected in the Commission's Application of Its Multi-Factor Test for Patent Offensiveness 32

1. *Pacifica* Does Not Allow Regulation of Protected Speech Upon the Talismanic Invocation of "Context" 33

2. The Commission's Multi-Factor Test for Patent Offensiveness and the "Contextual" Indecency Decisions Applying It Failed to Give Notice That the Brief, Non-Sexual Nudity in *NYPD Blue* Would Be Considered Indecent 34

3. Consideration of Context Does Not Give the Commission License to Make Artistic Judgments 43

C. The Second Circuit's Vagueness Analysis Is Not in Conflict with *Holder* 48

III. The Constitutional Infirmities in the Commission's Indecency Regime Are Not Cured by the Regulatory Safe Harbor or by the Commission's Claim of Difficulty in Creating a More Precise Standard 50

Conclusion 53

Appendix

Letter from Norman Goldstein to David Molina,
File No. 97110028 (May 26, 1999)..... 1a

Letter from William D. Freedman,
File No. EB-03-IH-0644 (Apr. 21, 2004)..... 3a

Letter from Edythe Wise to Suzan Cavin,
File No. 91100738 (Aug. 13, 1992) 18a

Letter from Edythe Wise to Deborah Engleman,
File No. 91060832 (Apr. 14, 1992)..... 22a

Letter from Edythe Wise to Donald E. Wildmon,
File No. C11-144 (Feb. 23, 1990) 27a

Table of Authorities

Cases

ABC, Inc. v. FCC,
404 Fed. Appx. 530 (2d Cir. 2011)
..... 12, 13, 26, 49 n.51

Action for Children's Television v. FCC,
852 F.2d 1332 (D.C. Cir. 1988), *superseded in part by* 58 F.3d 654 (D.C. Cir. 1995)..... 29

Action for Children's Television v. FCC,
932 F.2d 1504 (D.C. Cir. 1991), *superseded in part by* 58 F.3d 654 (D.C. Cir. 1995)..... 29 n.29

Action for Children's Television v. FCC,
58 F.3d 654 (D.C. Cir. 1995) 29 n.29

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 37 n.36

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 26 n.26

Brown v. Entertainment Merchants Ass'n,
564 U.S ---, 131 S. Ct. 2729 (2011) 28

Carey v. Population Servs., Int'l,
431 U.S. 678 (1977) 19

City of Lakewood v. Plain Dealer Publg. Co.,
486 U.S. 750 (1988) 17 n.18, 51 n.53

Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,
447 U.S. 530 (1980) 50

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 42, 51 n.54

FCC v. Fox Television Stations, Inc.,
556 U.S. 502, 129 S. Ct. 1800 (2009) 29 n.28

FCC v. Pacifica Found.,
438 U.S. 726 (1978) ..... *passim*

Fox Television Stations, Inc. v. FCC,
613 F.3d 317 (2d Cir. 2010)
..... 12-13, 25, 26, 28, 30, 34, 35, 45

Gentile v. State Bar of Nev.,
501 U.S. 1030 (1991) 52

Grayned v. City of Rockford,
408 U.S. 104 (1972) 27

Heffron v. International Soc'y for Krishna Consciousness, Inc.,
452 U.S. 640 (1981) 50 n.52

Holder v. Humanitarian Law Project,
561 U.S. ---, 130 S. Ct. 2705 (2010) 15-16, 48-49

Interstate Circuit, Inc. v. Dallas,
390 U.S. 676 (1968) 28

Kremens v. Bartley,
431 U.S. 119 (1977) 26 n.26

Liparota v. United States,
471 U.S. 419 (1985) 1 n.1

Miller v. California,
413 U.S. 15 (1973) 21 n.22

NAACP v. Button,
371 U.S. 415 (1963) 27-28, 34, 47

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 27

Nevada Comm'n on Ethics v. Carrigan,
564 U.S. ---, 131 S. Ct. 2343 (2011) 52-53

PDK Labs., Inc. v. U.S. Drug Enforcement Admin.,
362 F.3d 786 (D.C. Cir. 2004) 26 n.26

Perez-Vargas v. Gonzales,
478 F.3d 191 (4th Cir. 2007) 37 n.36

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 13, 23, 26 n.26

Red Lion Broad. Co. v. FCC,
395 U.S. 367 (1969) 26 n.26

Reno v. ACLU,
521 U.S. 844 (1997) 15, 19, 22 n.23, 27, 30, 32

Riley v. National Fed'n of the Blind of N.C., Inc.,
487 U.S. 781 (1988) 51-52

Sable Communications of Cal., Inc. v. FCC,
492 U.S. 115 (1989) 18-19

Schneider v. State of N.J. (Town of Irvington),
308 U.S. 147 (1939) 51

State v. Fly,
501 S.E.2d 656 (N.C. 1998) 46

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 47

United States v. Bass,
404 U.S. 336 (1971) 1 n.1

United States v. Playboy Entm't Group, Inc.,
529 U.S. 803 (2000) 19, 22 n.23, 47

United States v. Robel,
389 U.S. 258 (1967) 33-34

United States v. Williams,
553 U.S. 285 (2008) 27, 29, 32, 49

Washington State Grange v. Washington State Republican Party,
552 U.S. 442 (2008) 26 n.26

Constitutional Provisions

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. V ..... *passim*

Statutes

18 U.S.C. § 1464 ..... 1, 21 n.22, 31, 49

28 U.S.C. § 2462 ..... 6 n.6, 24 n.25

47 U.S.C. § 223 ..... 30 n.30

47 U.S.C. § 326 ..... 44 n.49

47 U.S.C. § 503 ..... 1 n.1

Pub. L. No. 109-325, 120 Stat. 491 (2006) 11 n.16

Regulations

47 C.F.R. § 0.445(e) 37 n.36

47 C.F.R. § 1.80(f)(3) 7 n.8

47 C.F.R. § 73.3999(b) 6, 16

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Federal Communications Commission

Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue", Forfeiture Order, 23 FCC Rcd 3147 (2008)
..... 11, 12, 13, 31, 36, 40, 41 n.45, 43, 44 n.48

Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue", Notice of Apparent

Liability for Forfeiture,
23 FCC Rcd 1596 (2008) 6-8, 44

Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order,
19 FCC Rcd 4975 (2004) 25

Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan", Memorandum Opinion and Order,
20 FCC Rcd 4507 (2005) 26, 36 n.35, 45

Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material, Memorandum Opinion and Order,
20 FCC Rcd 1920 (2005) 38

Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material, Memorandum Opinion and Order,
20 FCC Rcd 1931 (2005) 35 n.34

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order,
21 FCC Rcd 2664 (2006)
.....32 n.33, 35 n.34, 36 n.35, 40 n.44, 45

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Order,
21 FCC Rcd 13299 (2006)....8 n.9, 30 n.31, 36 n.35

Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement,
16 FCC Rcd 7999 (2001)..... 1, 7, 25, 31

Infinity Broad. Corp. of Pa.,
2 FCC Rcd 2705 (1987)..... 23 n.24

Infinity Broad. Corp. of Pa.,
3 FCC Rcd 930 (1987)..... 10

Letter from Edythe Wise to Deborah Engleman,
File No. 91060832 (Apr. 14, 1992)..... 38

Letter from Edythe Wise to Donald E. Wildmon,
File No. C11-144 (Feb. 23, 1990)..... 38 n.39

Letter from Edythe Wise to Suzan Cavin,
File No. 91100738 (Aug. 13, 1992)..... 37

Letter from Norman Goldstein to David Molina,
File No. 97110028 (May 26, 1999)..... 37-38, 42

Letter from William D. Freedman,
File No. EB-03-IH-0644 (Apr. 21, 2004)..... 38

Network Programming Inquiry,
25 Fed. Reg. 7293 (1960)..... 47

Pacifica Found., Inc.,
2 FCC Rcd 2698 (1987) 23 n.24

Regents of the Univ. of Cal.,
2 FCC Rcd 2703 (1987) 23 n.24

WGBH Educ. Found.,
69 F.C.C.2d 1250 (1978) 23 n.24, 36

WPBN/WTOM License Subsidiary, Inc.,
15 FCC Rcd 1838 (2000) 2, 35, 37, 47

Young Broadcasting of San Francisco, Inc.,
19 FCC Rcd 1751 (2004) 24 n.25

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NYPD Blue, Museum of Broadcast Communications, *available at* http://www.museum.tv/archives/etv/N/htmlN/nypdblue/nypdblue.htm 3 n.2

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BRIEF OF RESPONDENTS ABC TELEVISION AFFILIATES ASSOCIATION ET AL.

Introductory Statement

The Federal Communications Commission enforces the statutory prohibition on broadcast indecency, 18 U.S.C. § 1464,[1] by means of a multi-factor standard that purports to determine whether challenged speech is "patently offensive, as measured by contemporary community standards for the broadcast medium." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, ¶ 4 (2001) ("*Policy Statement*"). The Government contends that the FCC's indecency regime raises no constitutional concerns at all because the agency is reasonable and moderate in its regulatory approach.

This case disproves the Government's contention. Just days before a five-year statute of limitations was set to run, the Commission imposed a $1.24 million sanction on several dozen broadcasters for airing a very brief and wholly non-sexual glimpse of an actress's buttocks in the opening minute of an hour-long, critically-lauded, prime-time adult drama that had

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[1] The statute makes it a crime to broadcast "any obscene, indecent, or profane language." 18 U.S.C. § 1464. The FCC is authorized to impose civil forfeitures for violations of the statute. *See* 47 U.S.C. § 503(b)(1). Because Section 1464 is a criminal statute, the rule of lenity requires that it be construed narrowly. *See, e.g., Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347 (1971).

been on the air for a decade, that was widely recognized for its mature subject matter, that was preceded by audio and visual warnings, and that aired at a time of night when children were unlikely to be in the audience. This unprecedented fine was precipitated by and based on form complaints that lacked any indicia the "complainants" actually watched the allegedly offending material and that were filed months, and, in some cases, years, after the broadcast in issue. The Commission's decision to sanction that brief, non-sexual depiction of adult nudity as "indecent" neither respects broadcasters' significant First Amendment rights nor displays the regulatory restraint and sensitivity to context demanded by *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The body of FCC decisions applying the agency's indecency standard to a wide range of broadcasts in the years between *Pacifica* and *NYPD Blue* confirms that the FCC's current regulatory approach is quite the opposite of reasonable and restrained. In fact, before the 2003 *NYPD Blue* episode aired, the Commission had *never* applied its indecency standard to find wholly non-sexual nudity indecent, and, just in 2000, it declared that "nudity itself is not *per se* indecent." *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, ¶ 11 (2000). The Commission nevertheless cites its "contextual" standard as sufficient to put broadcasters on notice that brief, wholly non-sexual nudity might be found indecent and punished by millions of dollars in fines, even in 2003. If that is the "standard" the Commission applies, it plainly lacks the clarity and predictability compelled by the Due Process Clause, particularly where constitutionally-protected speech hangs in the balance.

The Commission's indecency regime is neither sufficiently deferential to the critical First Amendment rights at stake nor adequately sensitive to context. It is also neither suitably understandable nor predictable for broadcast licensees. A talismanic incantation of "context" does not justify subjectivity and uncertainty, nor does it excuse infringement on the full constitutional protection afforded even indecent speech. Under both the First Amendment and the Fifth Amendment, the Commission's broadcast indecency standard and its application in this case are unconstitutional.

Statement of the Case

1. *NYPD Blue* aired for 12 seasons on the ABC Television Network at 10:00 p.m. Eastern/Pacific Time, 9:00 p.m. Central/Mountain Time, from September 1993 through March 2005. Distinctive from the outset,[2] *NYPD Blue* was one of the most lauded and popular shows in television history: Among other accolades, the gritty police drama garnered 84 Emmy nominations and 20 Emmy awards, including Outstanding Drama Series and Outstanding Writing for a Drama Series,[3] two Peabody Awards, three Humanitas Awards for Best Writing, a National Board

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[2] The pilot episode ended with a dimly-lit lovemaking scene containing partial male and female nudity. *See* NYPD Blue, Wikipedia, *available at* http://en.wikipedia.org/wiki/Nypd_blue; NYPD Blue, Museum of Broadcast Communications, *available at* http://www.museum.tv/archives/etv/N/htmlN/nypdblue/nypdblue.htm.

[3] *See* Advanced Primetime Awards Search, Academy of Television Arts & Sciences, *available at* http://www.emmys.tv/awards/awardsearch.php.

of Review award for Best Television Series, awards from Viewers for Quality Television for Best Drama and acting, and many Golden Globe awards. During its long run, more than 12,500,000 viewers, on average, watched *NYPD Blue* each week.[4] Despite its realistic portrayal of adult situations, occasionally including partial nudity, the show was never found to have crossed the legal line during its long television broadcast run.

The indecency determination that precipitated this litigation arose from a brief opening scene in an episode of *NYPD Blue* that aired on February 25, 2003, during the show's tenth season. The scene in question was part of a broader story arc, developing over many months, involving the relationship between lead character Andy Sipowicz and fellow detective Connie McDowell. Sipowicz, a widower, is struggling to raise his eight-year-old son Theo at the same time that his relationship with McDowell is becoming serious. Eventually, Sipowicz and McDowell move in together, which leads to the scene in question.

In the 57-second scene, McDowell has entered the bathroom and is preparing to shower when Theo, just getting out of bed and unaware that she is in the bathroom, opens the door and sees McDowell. Both are surprised and embarrassed. McDowell covers herself with her hands and arms, Theo exits and says "sorry"; McDowell, still covering herself, says through the now-closed door, "It's okay, no problem." No sexual or excretory activities or organs are depicted or described during the scene, and McDowell's nude buttocks are

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[4] *See* NYPD Blue, Wikipedia, *available at* http://en.wikipedia.org/wiki/Nypd_blue.

displayed for fewer than seven seconds (that is, less than 0.25% of the entire hour-long episode).

The challenged scene, placed in context, is integral to the episode's storytelling of the awkwardness and discomfiture accompanying the introduction of a new romantic partner into the life of a single parent and his only child, specifically, and the multifaceted aspects of humanity through interrelationships, more generally. Drama requires conflict and resolution, and the *NYPD Blue* storytellers exercised editorial discretion in choosing to illustrate those broad lessons in a realistic and powerful way in the brief scene involving McDowell and Theo.

2. Mindful of the episode's content, the ABC Network voluntarily applied a rating of TV-14-DLV to the challenged episode. The TV-14 rating means

> Parents Strongly Cautioned—This program contains some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended.[5]

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[5] The TV Parental Guidelines, *available at* http://www.tvguidelines.org. The purpose of these voluntary program ratings is two-fold. *First*, program ratings alert parents to the type of material that a program contains so that they can make independent, contemporaneous judgments about whether that type of material is appropriate for their children. *Second*, program ratings enable parents with a V-chip-equipped television set to block the types of programs that they have determined in advance to be unsuitable for their unsupervised children.

The "D" designation means "intensely suggestive language." The "L" designation means "strong coarse language." The "V" designation means "intense violence." In addition, the episode was preceded by a visual and audio warning that stated,

> THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED.

The challenged episode aired at 10:00 p.m. in the Eastern and Pacific time zones and 9:00 p.m. in the Central and Mountain time zones—in the last hour of prime time but, in the Central and Mountain time zones, outside the FCC's regulatory "safe harbor" for broadcast indecency. *See* 47 C.F.R. § 73.3999(b).

3. On January 25, 2008, four years and 11 months after the episode was broadcast[6] and several years after *NYPD Blue* had ended its long television run, the Commission issued a Notice of Apparent Liability for Forfeiture[7] declaring for the first time its intent to challenge the episode as indecent. The *Notice* invoked the FCC's two-pronged definition of "broadcast indecency" as

> material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as

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[6] A five-year statute of limitations was about to run. *See* 28 U.S.C. § 2462.

[7] *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 1596 (2008) ("*Notice*") (Pet. App. 215a-262a).

> measured by contemporary community standards for the broadcast medium.

Notice, ¶ 4, Pet. App. 218a. With respect to the second component of the indecency standard, the Commission identified in its *Policy Statement* three "principal factors" that inform the analysis of patent offensiveness:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

Policy Statement, ¶ 10 (emphases omitted). "[F]ull context," the FCC says, is "'critically important'" to the determination of patent offensiveness. *Notice*, ¶ 5, Pet. App. 220a (quoting *Policy Statement*, ¶ 9 (emphasis omitted)).

On February 11, 2008, just over two weeks after the *Notice* issued, and in accordance with the foreshortened timeline the Commission imposed, the broadcasters filed oppositions to the *Notice*.[8]

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[8] In a departure from the Commission's standard practice, the *Notice*, issued late on a Friday, required responses in just 17 days, including three intervening weekends. The Commission's own rules, however, afford respondents "a reasonable period of time (usually 30 days from the date of notice)" to contest an indecency notice. 47 C.F.R. § 1.80(f)(3). The Commission denied the broadcasters' repeated requests for extensions of time to respond

4. The Commission claims to adhere to a policy of predicating indecency enforcement action only upon complaints from *bona fide* in-market or over-the-air viewers of the complained-of material.[9] The *Notice*, however, did not attach any of the "numerous" letters of complaint the FCC claimed to have received about the *NYPD Blue* episode. *Notice*, ¶ 8, Pet. App. 222a. Because the cited stations could not determine whether the proposed forfeiture was in fact premised on *bona fide* viewer complaints without examining those letters, various ABC affiliates requested copies of the complaints, both orally and in writing and, ultimately, by means of formal FOIA requests on a station-by-station basis. When the Commission grudgingly began producing copies of the letters just days before a response to the *Notice* was due,[10] it quickly became clear that the "thousands" of complaints the FCC had referenced were, in fact, roughly 100 form email complaints generated by an orchestrated campaign of the advocacy group American Family Association.[11]

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to the *Notice*. In fact, prior to the *Notice*, the Commission had never required a response to a Notice of Apparent Liability for Forfeiture for indecency in fewer than 30 days.

[9] *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299, ¶ 75 (2006) ("*Omnibus Remand Order*"), Pet. App. 102a-103a.

[10] As of the deadline for responses to the *Notice*, the Commission had not produced any complaints against eight of the stations it had already found apparently liable.

[11] Each complaint received by the Commission contained two identical sentences: "On February 25, ABC affiliate stations aired NYPD Blue. In the program, a young boy was exposed to full adult female nudity." *See, e.g.*, JA 298. The "complaints" simply parroted the language provided by the advocacy group.

The form "complaints" plainly were not *bona fide* complaints from actual viewers of the challenged program who had watched the program on the stations that were cited. None of the complaints were proximate in time: The earliest was dated July 8, 2003 (JA 300), nearly 4 1/2 months after the episode aired; the latest was dated April 22, 2005 (JA 372), more than two full years after the broadcast. None of the complaints indicated that the complainant's children had been exposed to the program. None of the form complaints stated that the complainant actually watched the episode in question, let alone on the station cited, and none provided a physical address to match the complaint with a television market and ABC station.[12] Each of the "complaints" objected not to the televised depiction of buttocks but—inaccurately—to the presumed in-studio exposure of the child actor to adult female nudity. *See* JA 298-417.[13] In their oppositions to the *Notice*, the broadcasters pointed out that the form "complaints" provided insufficient grounds for the proposed forfeiture under the Commission's own rules.[14]

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[12] The FCC belatedly attempted to remedy these deficiencies by sending an email to each "complainant" on December 29, 2005—some 34 months after the challenged broadcast—asking each to identify the call letters of the station on which, or the city in which, they watched the challenged episode. Notably, the Commission did not inquire whether any complainant actually *watched* the episode.

[13] In fact, throughout the filming of the scene, the actress's pubic area and parts of her breasts were covered with opaque fabric. *See* Brief for Respondents ABC, Inc. *et al.* at 6 n.4.

[14] As the form viewer "complaints" in this case illustrate, advances in technology have facilitated more than the widespread availability of the V-chip and the transition to digital television.

5. The legally deficient viewer "complaints" were the first but not the only flaw in the Commission's proposed indecency finding. Its lip service to "context" notwithstanding, the FCC failed to give appropriate consideration to the fact that the scene and its wholly non-sexual nudity were part of the episode's larger story arc,[15] and it simply ignored critical contextual factors that its own indecency orders have cited, including the character of the audience and the merit of the challenged program as it relates to the broadcast's patent offensiveness. *See, e.g., Infinity Broad. Corp., et al.*, 3 FCC Rcd 930, ¶¶ 16, 17 (1987) (subsequent history omitted). *NYPD Blue* was in its tenth television season when the challenged episode aired. It had received numerous awards for its gritty, realistic portrayal of adult situations, occasionally containing partial nudity, and the show's format and content were well-known to its nationwide television viewing audience. With 212 episodes preceding this one, *NYPD Blue* had established a "brand": Viewers, including parents, knew what to expect and the type of material (including occasional nudity) the show was likely to contain. These facts stand in stark contrast to

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Of particular import here, modern technology facilitates sweeping internet campaigns orchestrated by interest groups to generate mass complaints targeted at disfavored speech—precisely the course of events that prompted the FCC's action against *NYPD Blue*.

[15] Other story lines in the episode also deal with family and relationships: A man learns that his wife, the mother of his two children, is having an affair and plotting to have him murdered. A detective learns of his father's suicide after they quarreled. McDowell and another detective learn to sympathize with the victim of a petty theft after discovering the victim's only child had recently been killed by a drunk driver.

those found problematic in *Pacifica*.

6. Notwithstanding the show's long history, the prominent viewer advisory, the brevity of the scene, the non-sexual nature of the nudity, and the many other relevant measures of "context," the FCC declared the challenged scene indecent. In a final order dated February 19, 2008 (the "*Forfeiture Order*"), the FCC imposed an indecency forfeiture of $27,500 (at that time, the statutory maximum fine) on each of 45 television stations—resulting in a total fine of $1,237,500.[16] ABC timely paid all of the forfeitures imposed by the Commission, and all Respondents in *ABC v. FCC* sought judicial review of the *Forfeiture Order*.

Before the court of appeals, the ABC Television Affiliates Association and 43 stations affiliated with, but not owned by, ABC (collectively, the "ABC Affiliates" or "Affiliates") challenged the *Forfeiture Order*'s indecency determination both on the constitutional grounds now before the Court and also as arbitrary and capricious under the Administrative Procedure Act because the brief nudity at issue did not

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[16] *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Forfeiture Order, 23 FCC Rcd 3147 (2008) (Pet. App. 126a-214a) (imposing forfeitures on 43 television stations affiliated with the ABC Television Network as well as two ABC-owned stations). Since the issuance of the *Forfeiture Order*, Congress has increased the maximum fine for broadcast indecency to $325,000 per violation. *See* Pub. L. No. 109-325, 120 Stat. 491 (2006). The enormous fine imposed in this case belies the Government's suggestion that vagueness concerns are "mitigat[ed]" by the Commission's "consistent[]" refusal to "impose penalties in cases in which a broadcaster lacked fair notice that the Commission's indecency policy might apply." Petr. Br. at 20; *see also id.* at 31.

satisfy the FCC's own multi-factor indecency standard. The Affiliates argued that the depiction of buttocks failed to satisfy the first prong of the FCC's generic indecency definition because buttocks are not "sexual or excretory organs," and they contended that the challenged depiction did not satisfy the second prong based on the application of the Commission's three-factor test for "patent offensiveness" because the adult nudity was brief, wholly non-sexual, and integral to the storyline.

The ABC Affiliates further argued that the *Forfeiture Order* was arbitrary and capricious given its reliance on form complaints generated by a political advocacy group and lacking any indicia that a *bona fide* viewer of the program on each of the cited stations actually viewed the broadcast, was offended, and complained. Finally, the Affiliates contended that the *Forfeiture Order* deprived them of due process in light of the remarkable delay between the broadcast and the *Notice*, the FCC's belated and incomplete production of the underlying "viewer complaints," and the truncated schedule the agency imposed upon the Affiliates' response.

7. The United States Court of Appeals for the Second Circuit vacated the *Forfeiture Order*, relying on its prior decision in *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010) (Pet. App. 1a-34a). *See ABC, Inc. v. FCC*, 404 Fed. Appx. 530 (2d Cir. 2011) (summary order) (Pet. App. 118a-125a). Applying this Court's long-settled vagueness jurisprudence, the *Fox* panel had held, in July 2010, that "the FCC's policy violates the First Amendment because it is unconstitutionally vague, creating a

chilling effect that goes far beyond" its treatment of fleeting materials. *Fox*, Pet. App. 2a; *see also id.* 23a.

The court of appeals concluded that "*Fox*'s determination that the FCC's indecency policy is unconstitutionally vague binds this panel." *ABC*, Pet. App. 124a. That is so, the court reasoned, because "[a]lthough this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found 'impermissibly vague.'" *Id.* (quoting *Fox*).[17]

Summary of Argument

1. It has long been the practice of this Court to decide cases on the narrowest ground available, particularly where constitutional issues are presented. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995). In this case, the Court need go no further than *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to determine that the *Forfeiture Order* violates the First Amendment. *Pacifica* narrowly affirmed the application of the Commission's then-existing and far more restrained indecency enforcement policy to an afternoon radio broadcast of comedian George Carlin's expletive-laden "Filthy Words" monologue. As *Pacifica*'s carefully limited holding makes clear, the First Amendment protects even indecent speech against government regulation in circumstances other than those equivalent to the "verbal shock treatment" "repeated over and over" that *Pacifica* addressed.

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[17] Because it found *Fox* controlling, the court of appeals did not reach the other constitutional and procedural issues raised by the Affiliates.

The Government reads *Pacifica* as an open-ended endorsement of the Commission's regulatory regime, but the explicitly narrow decision in *Pacifica* was predicated on a commitment that the Commission would apply its indecency policy with restraint, sensitive to the substantial free speech interests of broadcasters. For years after *Pacifica*, the Commission kept that promise and limited indecency enforcement actions to repetitive "verbal assaults" of the sort proscribed in *Pacifica*, refusing altogether to find fleeting words or non-sexual images actionably indecent. Then the Commission changed its mind. The FCC's current indecency enforcement standard—pursuant to which even a fleeting, unscripted expletive or a brief, wholly non-sexual glimpse of adult nudity can be punished by millions of dollars in fines—bears no resemblance to the "restrained" policy this Court considered in *Pacifica*.

Pacifica's emphatically narrow holding confirms that the Commission cannot sanction the *NYPD Blue* episode as indecent: A brief, wholly non-sexual depiction of adult buttocks in the opening minute of a long-running prime-time adult drama widely recognized for its mature subject matter cannot be equated to a 12-minute, expletive-laced "verbal shock treatment" broadcast in the middle of the afternoon at a time when children were likely to be in the audience. That alone is sufficient reason to find the Commission's order in this case unconstitutional.

2. a. Although *Pacifica* is dispositive, this case highlights a second, and equally fatal, constitutional shortcoming in the Commission's indecency standard: Applying long-settled Fifth Amendment jurisprudence, the court of appeals concluded that the FCC's

indecency enforcement policy fails to give broadcast licensees reasonable notice of what speech is prohibited. The court of appeals acknowledged the holding in *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997), that materially identical language in the Communications Decency Act was unconstitutionally vague, and it correctly concluded that the FCC's "gloss" on that language in the form of its multi-factor, contextual standard for patent offensiveness and decisions applying that standard only worsen the vagueness problem.

b. The Second Circuit's conclusion was predicated on the body of prior FCC decisions applying the indecency standard—decisions that the FCC itself cites as giving broadcasters guidance about where the indecency line will be drawn. Far from providing clarity and certainty, however, the Commission's indecency decisions, and the regulatory standard they purport to embody, offer no discernible guidance about what speech will, and will not, be considered actionably indecent "in context"—particularly with respect to brief, non-sexual televised nudity. Indeed, prior to the 2003 *NYPD Blue* broadcast, the Commission had *never* applied its indecency standard to find non-sexual nudity indecent. The lack of clear notice to broadcast licensees, and the resulting chill on constitutionally-protected speech, are intolerable.

c. Contrary to the Government's suggestion (*see* Petr. Br. at 24-25), *Holder v. Humanitarian Law Project*, 561 U.S. ---, 130 S. Ct. 2705 (2010), does not foreclose consideration of Commission decisions applying its indecency policy to other broadcasts to determine whether that policy is unconstitutionally vague. *Holder* did not rein in the contours of the

Due Process Clause's vagueness jurisprudence, and it does not preclude a facial vagueness challenge by a party (such as the broadcasters here) whose conduct was not clearly proscribed by the challenged rule.

3. The constitutional flaws in the Commission's "flexible" indecency standard are not cured by the existence of the regulatory "safe harbor" for broadcast indecency. *See* 47 C.F.R. § 73.3999(b). The Government points to nothing in this Court's Fifth Amendment jurisprudence that allows vague regulation of constitutionally protected speech so long as alternative channels for disseminating that speech remain. And this Court has long made clear that the First Amendment does not permit the Government to justify a content-based regulation by pointing to alternative avenues for the regulated speech.

Nor is the uncertainty inherent in the Commission's indecency standard acceptable because the Commission believes it would be "difficult" to craft a clear and predictable standard. As a matter of constitutional jurisprudence, the Commission is not permitted to infringe on the free speech rights of broadcasters simply because it finds the task of articulating and applying a more precise standard taxing.

* * *

The Commission's decision to abandon its formerly restrained approach to broadcast indecency regulation in favor of a "flexible" indecency policy that turns on the agency's talismanic invocation of "context" invites wholly subjective, and thus inherently unpredictable, judgments about where the indecency line will be drawn from one case to the next. As a matter of administrative law and procedure, the Commission

may be free to change its mind about where that line ought to be drawn, but the Constitution gives it far less leeway: The First Amendment affords broad protection even to indecent speech and thus firmly limits the reach of the FCC's regulatory authority, and the Fifth Amendment does not tolerate even the risk of content discrimination, or the resulting chill on constitutionally-protected expression, inherent in arbitrary and unpredictable regulation of speech by government decision-makers.[18] Measured against the settled requirements of both the First and the Fifth Amendments, the Commission's indecency policy cannot stand.

Argument

Whether measured against the First Amendment or the Fifth Amendment, the Commission's indecency enforcement regime and its application to the challenged episode of *NYPD Blue* are unconstitutional.

I. *Pacifica* Both Establishes the Analytical Framework for Evaluating the Constitutionality of the Commission's Indecency Regime and Defines the Limits of Its Regulatory Authority

The Affiliates agree with the Government (Petr. Br. at 20, 21, 36) that *Pacifica* need not be overruled to decide this case. Quite the contrary, the resolution of the First Amendment issues here follows directly from

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[18] *Cf. City of Lakewood v. Plain Dealer Publg. Co.*, 486 U.S. 750, 763-64 (1988) ("[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.").

a straightforward application of *Pacifica*'s narrow holding, which makes clear that the FCC's application of its indecency policy in *ABC* cannot be sustained.

A. *Pacifica* Makes Clear That the Commission's Authority to Regulate Indecency Is Extremely and Necessarily Limited in Light of the First Amendment and Cannot Extend to the Proscription of Brief, Non-Sexual Nudity

The ABC Affiliates agree with the Government that the FCC's indecency decisions here should be evaluated under the framework established by *Pacifica*.[19] That analytical framework begins with and necessarily acknowledges the full constitutional protection afforded even indecent speech. *See, e.g.*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[E]xpression which is indecent but not obscene is

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[19] Although the Government now embraces *Pacifica* as an endorsement of the Commission's indecency regulatory authority, in 1978, the Office of the Solicitor General filed a separate brief in *Pacifica* to express the view that the FCC's regulatory action in that case was an affront to the First Amendment—despite the fact that the Commission did not propose to impose any sanction on the broadcaster in *Pacifica* beyond placing a letter in the station's license file. *See* Br. for the United States, *FCC v. Pacifica Found.*, No. 77-528, 1978 WL 206846, at *24-*39 (Mar. 27, 1978); *Pacifica*, 438 U.S. at 730 (noting that the FCC declined to impose "formal sanctions, but it did state that the order would be 'associated with the station's license file'"). Much has changed: The Government now attempts to defend the Commission's indecency regime—and the $1.24 million fine imposed for the broadcast of less than seven seconds of non-sexual nudity during a prime-time drama targeted at an adult audience—as logical outgrowths of *Pacifica*.

protected by the First Amendment . . . ."); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 814 (2000); *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997). Full First Amendment protection for all indecent speech is the background rule against which the Commission's attempts to regulate must be evaluated.

The Government now describes *Pacifica* as a broad endorsement of the Commission's indecency regime, but *Pacifica* was a categorically "narrow[]" decision, as the First Amendment required it to be. *See Sable Communications*, 492 U.S. at 127 (describing *Pacifica*'s holding as "emphatically narrow"); *Reno*, 521 U.S. at 870 (quoting *Sable*). The question before the Court in *Pacifica* was whether the FCC "has *any* power to regulate a radio broadcast that is indecent but not obscene." 438 U.S. at 729 (emphasis added).[20] In narrowly approving the FCC's authority only to the extent it had been invoked to sanction the daytime radio broadcast of comedian George Carlin's expletive-filled "Filthy Words" monologue, *Pacifica* effectively established the constitutional limits of the FCC's authority to regulate broadcast indecency: The Court allowed regulation of repeated expletives that were tantamount to a public nuisance. *Id.* at 750 ("The

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[20] *See also Pacifica*, 438 U.S. at 735 ("the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast"); *id.* at 742 ("our review is limited to the question whether the Commission has the authority to proscribe *this particular broadcast*" (emphasis added)).

Commission's decision rested entirely on a nuisance rationale under which context is all-important."). Importantly, in a portion of the fractured opinion that commanded a majority of the Court, *Pacifica* was careful to note that the Court did not intend to sanction the regulation of an isolated expletive or a brief image: The Court expressly did not "decide[] that an occasional expletive in [an Elizabethan comedy] would justify any sanction . . . ." *Id.* at 750.[21]

Any doubt about the narrow scope of the regulatory authority endorsed by *Pacifica* is eliminated by the concurrence of Justices Powell and Blackmun, without which there would have been no majority. Writing separately to underscore that *Pacifica* should not be read to confer upon the FCC "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from *momentary* exposure to it in their homes," Justices Powell and Blackmun approved of FCC regulatory authority of only the narrowest scope:

> The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.

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[21] It bears mentioning that *Roots*, the most highly rated miniseries in television history, had aired on ABC stations around the country in January 1977 and thus was in the national consciousness when the Court issued its *Pacifica* decision. *Roots*, of course, included multiple depictions of non-sexual nudity, including images of topless female African villagers in its opening episode.

Id. at 759-60, 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added).

Further underscoring the narrowness of the Court's holding, Justice Brennan dissented, admonishing the Commission that it should not cite *Pacifica* as authority "for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing *the relentless repetition, for longer than a brief interval,*" of language that meets the agency's definition of indecency, "[f]or surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of 'verbal shock treatment' condemned here." *Id.* at 772 n.7 (Brennan, J., dissenting) (emphasis added); *see also id.* at 771 (noting that the plurality and concurring opinions "do no more than permit the Commission to censor the afternoon broadcast of the 'sort of verbal shock treatment' . . . involved here" but otherwise seek to "insure that the FCC's regulation of *protected speech* does not exceed these bounds" (emphasis added)).[22]

Justice Powell's opinion makes clear where *Pacifica* drew the line between permissible regulation of speech and unlawful censorship: *Pacifica* permitted FCC

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[22] Because obscenity is one of the few categories of speech historically recognized as falling outside the protections of the First Amendment, *see, e.g., Miller v. California*, 413 U.S. 15, 23 (1973), a regulatory sanction for the broadcast of obscenity would raise no First Amendment concerns. Four dissenting Justices in *Pacifica* would have invalidated the Commission's regulation of the Carlin monologue on the ground that "indecent" in Section 1464 should be interpreted to mean "obscene"—and because the Carlin monologue did not satisfy the well-settled definition of obscenity, it could not be regulated at all. *See* 438 U.S. at 778-79 (Stewart, J., dissenting).

regulation of broadcast indecency in only the narrowest of circumstances. That narrow holding leaves *all* indecent speech other than a "verbal shock treatment" (or its visual equivalent)—including fleeting offensive words or isolated glimpses of nudity—fully protected against regulation. Measured against that rule, the FCC's indecency finding with respect to *NYPD Blue* cannot be squared with the First Amendment: It is impossible to equate the afternoon radio broadcast of the 12-minute, expletive-laden Carlin monologue, a "verbal shock treatment" "repeated over and over," *Pacifica*, 438 U.S. at 757 (Powell, J., concurring in part and concurring in the judgment), with the brief and isolated glimpses of an actress's buttocks in the opening minute of an hour-long, critically-acclaimed, prime-time adult drama that was preceded by visual and audio warnings about partial nudity and accompanied by a voluntary self-rating, had been on the air for a decade, and was widely known to feature mature themes and even occasional nudity.[23]

Straightforward application of *Pacifica*'s narrow holding against the backdrop of the full First Amendment protection accorded all indecent speech

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[23] Another important point of distinction exists: *Pacifica* considered the Commission's ability to regulate a radio broadcast that could not have been blocked. The *NYPD Blue* broadcast, by contrast, was accompanied by a V-chip rating that enabled parents to control children's access to the program. On that point alone, upholding the indecency sanction against the *NYPD Blue* episode would be a significant expansion of *Pacifica*'s narrow holding, and one totally unwarranted based upon its stated rationale and the Court's later jurisprudence. *See, e.g.*, *Playboy*, 529 U.S. at 815 ("[T]argeted blocking . . . support[s] parental authority without affecting the First Amendment interests of speakers and willing listeners . . . ."); *Reno*, 521 U.S. at 879.

compels the conclusion that the regulatory sanction imposed for the broadcast of the challenged *NYPD Blue* episode is unconstitutional. The Court need go no further to decide this case. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (noting that the Court first considers "the narrower ground for adjudication of . . . constitutional questions").

B. *Pacifica* Was Predicated on the FCC's Commitment to a Restrained Indecency Enforcement Regime That the Commission Has Now Abandoned

Not only was *Pacifica* an avowedly narrow decision, the Court expected the FCC to treat it as such going forward: It upheld the Commission's indecency determination on the precise facts of that case only because the FCC could be "expected to proceed cautiously, as it has in the past," to avoid "an undue 'chilling' effect on broadcasters' exercise of their rights." *Id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment).

And for more than a quarter century after *Pacifica*, the Commission did just that, applying its indecency regime with restraint, remaining sensitive to the substantial First Amendment interests at stake. In particular, for nearly thirty years after *Pacifica*, the FCC itself read the case to draw a firm constitutional line between deliberate, repetitive language of the kind at issue in *Pacifica*, on the one hand, and isolated instances of "indecent" language, on the other.[24] The

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[24] In a decision issued immediately after *Pacifica*, the

agency limited its enforcement actions accordingly. During that time, there were few complaints about television broadcasts and even fewer determinations of actionable indecency. In fact, the Commission issued no decisions finding televised non-sexual nudity indecent between 1978 and 2004, but it issued numerous decisions finding televised nudity, including even sexual nudity, *not* to be indecent during that lengthy period. *See* pp. 35-38, *infra*.[25]

Commission declared its "inten[tion] strictly to observe the narrowness of the *Pacifica* holding," which "relied in part on the repetitive occurrence of the 'indecent' words" in the Carlin monologue. *WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶¶ 2, 5-7, 10 (1978) (dismissing complaints about, *inter alia*, scenes of adult nudity in *Monty Python's Flying Circus* in the absence of the sort of repetition essential to the decision in *Pacifica*). In fact, for several years after *Pacifica*, the Commission adhered to the position that only the exact words used in the Carlin monologue would be found actionably indecent. *See Pacifica Found., Inc.*, 2 FCC Rcd 2698, ¶ 12 (1987). In 1987, the Commission declared its intent to return to the generic indecency standard it had applied in *Pacifica*, fearing that an enforcement policy limited to specific words was unduly narrow and easily circumvented. *See id.* ¶¶ 12-13. Even so, it continued to act with restraint, maintaining that a single, isolated expletive would not trigger indecency review. *See, e.g., Regents of the Univ. of Cal.*, 2 FCC Rcd 2703, ¶ 3 (1987) ("Speech that is indecent must involve more than an isolated use of an offensive word."); *Pacifica Found.*, 2 FCC Rcd 2698, ¶ 13 ("[D]eliberate and repetitive use [of expletives] in a patently offensive manner is a requisite to a finding of indecency."); *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd 2705, ¶ 6 (1987) (acknowledging that "the First Amendment dictate[s] a careful and restrained approach" to indecency regulation).

[25] In 2004, the Commission departed from this precedent and proposed a forfeiture based on a determination that the brief depiction of a penis for 23/100 of one second during a morning news show was actionable. *See Young Broadcasting of San*

Even as recently as its 2001 *Policy Statement*, which for the first time distilled from prior decisions the three factors that the Commission claims to weigh in order to determine "patent offensiveness," the Commission reiterated its restrained approach to the regulation of broadcast indecency. *See Policy Statement*, ¶¶ 3-5, 9. In keeping with its commitment to regulatory restraint, the *Policy Statement* maintained that "fleeting and isolated" expletives would not satisfy the patently offensive test. *Id.* ¶ 18.

Just three years later, however, the Commission changed course dramatically, declaring for the first time that even a single, non-literal "fleeting" expletive could be found actionably indecent. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975, ¶¶ 8-12 (2004) ("*Golden Globes Order*") (finding indecent singer Bono's exclamation upon winning a 2003 Golden Globe Award that "this is really, really, fucking brilliant"). Since that time, as the *Fox* and

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Francisco, Inc., 19 FCC Rcd 1751 (2004). As the ABC Affiliates have noted throughout this litigation, the Commission cannot rely on *Young Broadcasting* to establish that the brief, non-sexual depiction of adult nudity can be actionably indecent. The licensee in that case refused to pay the proposed forfeiture and opposed the Notice of Apparent Liability. The FCC refused to address the merits of the licensee's opposition for several years, and the expiration of the governing statute of limitations, 28 U.S.C. § 2462, prohibits the Commission from now taking enforcement action against the broadcaster. Accordingly, *Young Broadcasting* should be given no weight whatsoever. In any event, the *Young Broadcasting* decision was issued *after* the challenged *NYPD Blue* episode aired in 2003 and thus could not have provided notice to broadcasters that brief, non-sexual nudity might be found indecent under the Commission's "contextual" standard.

ABC decisions make clear, the indecency regime has come entirely unmoored from the FCC's longstanding pledge to proceed with caution and exercise restraint given "'the high value our Constitution places on freedom and choice in what the people say and hear'" (*Fox*, Pet. App. 27a (quoting *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, ¶ 11 (2005) ("*Saving Private Ryan*")))—the restraint that this Court expressly cited in permitting the regulation challenged in *Pacifica*. The FCC's broadcast indecency policy can no longer fairly be described as "restrained," as the First Amendment requires it to be.[26]

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[26] Because a careful reading and thoughtful application of the analytical framework established in *Pacifica* resolves the parties' challenges to the FCC's indecency regime, it is unnecessary for the Court to reconsider the "special treatment" given the regulation of broadcast indecency, *see Pacifica*, 438 U.S. at 748-50, or the congressionally-mandated public trustee regulatory framework for broadcast media approved in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). It is a long-settled jurisprudential rule that the "Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Kremens v. Bartley*, 431 U.S. 119, 136 (1977) (internal quotation marks and citation omitted); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (same); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (same: applying rule in First Amendment context). *Cf. Plaut*, 514 U.S. at 217; *see also PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("[I]f it is not necessary to decide more, it is necessary not to decide more . . . .").

II. The FCC's Indecency Enforcement Regime Is Unconstitutionally Vague

The Commission's recent decision to trade certainty for "flexibility" (*see* Petr. Br. at 6-7, 35) has served only to create new and additional constitutional problems for the agency's indecency policy: The current multi-factor "contextual" indecency standard both fails to reflect the restraint compelled by the First Amendment and fails to provide the certainty and predictability compelled by the Due Process Clause, particularly where constitutionally-protected speech hangs in the balance.

It is well settled that our Constitution protects speakers against "arbitrary and discriminatory enforcement of vague standards" implemented by governmental decision-makers. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). The Government correctly recites the applicable rule: A law avoids invalidation for unconstitutional vagueness only if it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also United States v. Williams*, 553 U.S. 285, 304 (2008); Petr. Br. at 26. That notice to regulated entities is particularly important with respect to content-based restrictions on speech: "The vagueness of . . . a [content-based] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno*, 521 U.S. at 871-72; *see also NAACP v. Button*, 371 U.S. 415, 432-33 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow

specificity."). And "[t]hese principles apply to laws that regulate expression for the purpose of protecting children." *Brown v. Entertainment Merchants Ass'n*, 564 U.S ---, 131 S. Ct. 2729, 2743 (2011) (Alito, J., concurring) (citing *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689 (1968)).

Applying these settled rules, the court of appeals correctly rejected the FCC's "new" indecency regime as unconstitutionally vague, concluding that "the absence of reliable guidance" in the FCC's indecency decisions "chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature." *Fox*, Pet. App. 34a. The Commission's erratic and unpredictable enforcement of its indecency standard in the years since *Pacifica*—and particularly since 2004—leaves broadcasters to guess at what speech the Commission might deem contextually "indecent," and that uncertainty has had a demonstrably strong chilling effect on broadcasters' constitutionally protected expression. *See Fox*, Pet. App. 27a, 31a-34a.[27]

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[27] The Government's defense of the indecency standard amounts to a contention that, even if there is lack of clarity "at the margins," the standard is sufficiently clear to give *most* broadcasters sufficient notice of where the line is drawn *most* of the time. *See, e.g.*, Petr. Br. at 35-36 (contending that "many if not most of the broadcasts that are close to the indecency line are . . . far removed from typical broadcast fare"). Broadcasters disagree with the predicate of the Government's argument, as the record makes clear that speech at the core, rather than just the periphery, of the First Amendment has been chilled. *See Fox*, Pet. App. 31a-34a (reciting record evidence that the vague indecency standard has resulted in broadcasters' refusals to air, among other things, news and public affairs programming and a Peabody Award-winning documentary about the events of September 11, 2001). In any event, it is the government, not the

Because the Commission's indecency regime fails to provide broadcasters with "fair notice of what is prohibited," the Fifth Amendment requires that it be set aside. *Williams*, 553 U.S. at 304.

A. *Reno* Establishes the Vagueness of the FCC's Generic Definition of Indecency

The Government places great weight on the fact that the Commission's basic definition of indecency has remained unchanged since the indecency determination this Court upheld in *Pacifica*.[28] The Government also makes much of the decision of the court of appeals in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*), that the FCC's generic indecency definition is not unconstitutionally vague.[29] Of course, both decisions

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speaker, that should steer clear of regulation where protected speech could be impacted.

[28] *See* Petr. Br. at 4, 33 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, ---, 129 S. Ct. 1800, 1806 (2009) (noting that the "definition of indecent speech" at issue in *Pacifica* is the same one the FCC "uses to this day")).

[29] *See* Petr. Br. at 7-8, 33, 40 (citing *ACT I*, 852 F.2d at 1334, 1338-39). In fact, *ACT I* did not purport to reach a considered conclusion that the FCC's indecency definition is not unconstitutionally vague. The court instead "infer[red] from [*Pacifica*] that the Court did not regard the term 'indecent' as so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." 852 F.2d at 1338-39 (internal quotation marks and citation omitted). But *Pacifica* said nothing about vagueness, because the broadcaster in that case had not raised a vagueness challenge. *See, e.g.*, 438 U.S. at 742. The later *ACT* cases simply followed *ACT I*'s vagueness "holding." *See Action for Children's Television v. FCC*, 932 F.2d

predated *Reno*, in which this Court held a definition of "patent offensiveness" materially identical to the FCC's basic definition of indecency to be impermissibly vague.

At issue in *Reno* was a provision of the Communications Decency Act that prohibited the online transmission to minors of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[30] The Court found the statutory prohibition to contain so "many ambiguities" as to render it "problematic for purposes of the First Amendment" because the inherent vagueness of the prohibition had an "obvious chilling effect on free speech." 521 U.S. at 870 (first two quotations), 872 (third quotation). The CDA's definition of prohibited material is indistinguishable from the Commission's generic definition of indecency[31]; *Reno*, then, dictates that the Commission's basic definition of indecency is likewise unconstitutionally vague. As the court of appeals recognized, "language that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another." *Fox*, Pet. App. 21a.

Even setting *Reno* aside, the Commission's generic definition of indecency is unconstitutionally vague as

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1504, 1508 (D.C. Cir. 1991) (*ACT II*); *Action for Children's Television v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (*ACT III*).

[30] The proscriptions are codified at 47 U.S.C. § 223.

[31] That standard, as noted above, "defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." *Omnibus Remand Order*, ¶ 15, Pet. App. 45a.

applied to the *NYPD Blue* broadcast. According to the Commission, in order to be deemed indecent, material "*must* fall within the subject matter scope of our indecency definition—that is, the material *must* describe or depict sexual or excretory organs or activities." *Policy Statement*, ¶ 7 (emphases added). Buttocks do not fall within the "subject matter scope" of the Commission's indecency scheme because they are neither sexual nor excretory organs—indeed, they are not organs at all. Instead, buttocks are part of the muscular system, defined as "[e]ither of the two rounded prominences on the human torso that are posterior to the hips and formed by the gluteal muscles and underlying structures." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 262 (3d ed. 1996). They have no sexual or excretory function whatsoever.[32]

In this case, the Commission admits that buttocks are "not physiologically necessary to procreation or excretion" but objects to the application of "narrow physiological" definitions. *Forfeiture Order*, ¶¶ 8, 10, Pet. App. 133a, 137a. Instead, the Commission claims "broad discretion" to interpret Section 1464's ban on indecency so as to proscribe the depiction of body parts "that are closely associated with sexuality or excretion" and whose "public exposure is considered socially inappropriate and shocking." *Forfeiture Order*, ¶ 9, Pet. App. 134a-135a. But that interpretation is *two*

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[32] *Compare* W.D. Gardner & W.A. Osburn, ANATOMY OF THE HUMAN BODY 223-25 (3d ed. 1978) (describing buttocks as part of the muscular system) *with* R.T. Francouer, COMPLETE DICTIONARY OF SEXOLOGY 588 (2d ed. 1995) (defining sexual organs biologically) *and* Gordon Alexander, GENERAL BIOLOGY 203-04 (2d ed. 1962) (describing excretory system in humans).

steps removed from the statute and reaches substantially further than the clear language of the Commission's own indecency definition. Having defined indecency at the threshold in terms with established and understandable (biological) meanings, the Commission cannot now claim that the words that it itself chose to use mean something else altogether. If that is the Commission's argument, it is clear that no reasonable broadcaster, and certainly not the ABC stations subject to the million-dollar fine in this case, could have had "fair warning" of what was prohibited. *Williams*, 553 U.S. at 304.

B. Consideration of Context Does Not Justify the Inconsistent and Unpredictable Decisionmaking Reflected in the Commission's Application of Its Multi-Factor Test for Patent Offensiveness

The Government contends that *Reno* does not control because the Commission provides broadcasters with additional guidance beyond the generic indecency definition in the form of its multi-factor standard for "patent offensiveness" and a series of agency decisions applying that standard over the last decade.[33] Neither the "standard" nor Commission precedent cures the

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[33] *See, e.g., Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, ¶ 2 (2006) ("*Omnibus Order*") ("The cases we resolve today represent a broad range of factual patterns. Taken both individually and as a whole, we believe that they will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard.").

vagueness problem; both, in fact, make matters worse. The Commission's patent offensiveness "factors" do not purport to define indecency, they are inherently subjective and imprecise, and they offer no indication as to how the Commission will weigh them (or other, unspecified factors) in any case. Moreover, the Commission has applied its "contextual" definition of indecency so inconsistently and contradictorily that broadcasters simply cannot know with any reasonable degree of certainty where the Commission will draw the indecency line from one case to the next.

1. *Pacifica* Does Not Allow Regulation of Protected Speech Upon the Talismanic Invocation of "Context"

Contrary to the Government's suggestion (*see, e.g.*, Petr. Br. at 19, 35), the Commission's new, more "flexible" indecency standard, augmented by its multi-factor test for patent offensiveness, is not redeemed by the mere invocation of context. It is true that *Pacifica* cited context as a critical component of the Commission's indecency regime, but it did so because only by considering the "context" of the challenged broadcast (a 12-minute, expletive-laced "verbal assault" on radio listeners in the middle of the afternoon, when children were likely to be in the audience) could the agency (and this Court) determine that the FCC's indecency finding respected the First Amendment interests at stake. *See* 438 U.S. at 750. But *Pacifica*'s decidedly narrow holding did not give the Commission *carte blanche* to regulate constitutionally-protected speech so long as the agency simply recites consideration of "context." *Cf. United States v. Robel*, 389 U.S. 258, 263-64 (1967) (observing

that the "talismanic incantation" of Congress's "war power" cannot "remove constitutional limitations safeguarding essential liberties" (quotation omitted)).

As the court of appeals noted (*Fox*, Pet. App. 30a), the agency's "flexible" and *contextual* determinations of indecency must nevertheless identify and apply consistent, predictable, and objective criteria that give broadcasters fair notice of where the Commission will draw the indecency line. A "contextual" standard unaccompanied by such objective criteria creates an unacceptable risk of subjective, content-based decision-making. "Specificity, on the other hand, guards against subjectivity and discriminatory enforcement." *Fox*, Pet. App. 19a; *see also, e.g.*, *NAACP v. Button*, 371 U.S. at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

2. The Commission's Multi-Factor Test for Patent Offensiveness and the "Contextual" Indecency Decisions Applying It Failed to Give Notice That the Brief, Non-Sexual Nudity in *NYPD Blue* Would Be Considered Indecent

1. The Government contends that the court of appeals ignored what the Government describes as "the dispositive question" in this case: "whether Fox and ABC had fair notice that the expletives and nudity in the broadcasts under review could violate the Commission's indecency standards." Petr. Br. at 17, 25. But that is precisely the question the court of

appeals addressed (*see Fox*, Pet. App. 22a-23a), and it answered that question in the negative based on its determination that the FCC's own decisions applying its "contextual" indecency policy—the very same decisions that the Commission itself touts as providing regulatory guidance to broadcasters—have produced "a standard that even the FCC cannot articulate or apply consistently." *Fox*, Pet. App. 27a. The Commission's body of indecency decisions—and the application of its indecency standard in this case—reveal an indecency policy that is inconsistent, irreconcilable, and incapable of being distilled into any discernible rules or standards that could provide broadcasters with the notice and predictability the Constitution requires.

Most significantly in this case, prior to the *NYPD Blue Notice*, broadcasters had no reason to believe that the broadcast of brief, non-sexual nudity would be found indecent. The Commission had declared unequivocally in 2000 that "nudity itself is not *per se* indecent." *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, ¶ 11 (2000) ("*Schindler's List*").[34] And, until the *Notice*, the FCC *had never found non-sexual nudity indecent*. *Compare Schindler's List*, ¶¶ 11, 13 (finding televised nudity, including two extended scenes containing multiple depictions of breasts,

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[34] The Commission has illustrated the point in a number of decisions finding various depictions of partial nudity not sufficiently "graphic or explicit" to trigger the indecency standard. *See, e.g., Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1931, ¶¶ 6, 9 (2005) (depiction of animated character's buttocks entering shower not graphic or explicit); *Omnibus Order*, 21 FCC Rcd 2664, ¶ 215 (depiction of penis on *The Today Show* "not explicit or graphic").

buttocks, and full frontal male and female adult nudity, not actionably indecent "in context" because the nudity was "neither pandering nor titillating") *and WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶¶ 2, 10 (1978) (dismissing complaint challenging scenes of nudity in *Monty Python's Flying Circus* given absence of evidence that the broadcaster had engaged in the type of repeated shock treatment necessary to trigger action under *Pacifica*) *with Forfeiture Order*, ¶ 18, Pet. App. 148a (finding depiction of nude buttocks lasting less than seven seconds actionably indecent).[35]

The Commission attempts to discount broadcasters' confusion in light of the dearth of *published* decisions by the full Commission finding nudity non-actionable.

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[35] Evidence of the Commission's inability to apply its "contextual" standard consistently so as to provide fair warning to broadcast licensees is not confined to rulings on depictions of nudity. Its decisions with respect to expletives are equally perplexing. As one example, the Commission originally deemed a single use of the word "bullshitter" indecent because it occurred in the course of a live interview broadcast during a morning news segment. *Omnibus Order*, 21 FCC Rcd 2664, ¶¶ 137, 141. Upon remand from the Second Circuit (at the Commission's request), the agency reversed course and declared the same use of the term not actionably indecent precisely *because* it aired during a "bona fide news interview." *Omnibus Remand Order*, 21 FCC Rcd 13299, ¶¶ 71-73. To similar effect, compare *Saving Private Ryan*, 20 FCC Rcd 4507, ¶ 14 (finding numerous expletives uttered during television broadcast of the fictional movie *Saving Private Ryan* not indecent because deletion of the expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers") *with Omnibus Order*, 21 FCC Rcd 2664, ¶ 82 (finding expletives used by real musicians during PBS documentary *The Blues: Godfathers and Sons* indecent because the educational purpose of the film "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives").

In only a single (and distinguishable, it says) published order—*Schindler's List*—has the Commission applied its "contextual" standard to find televised nudity not indecent. *See* Petr. Br. at 31-32. That argument ignores the long line of FCC staff decisions[36] finding televised depictions of adult nudity, including sexualized nudity and depictions of nudity far longer than seven seconds, not actionable "in context." In the years before *NYPD Blue*, the agency found "scenes of a topless woman in bed with her lover, with her breasts very clearly exposed [and] several scenes of a topless woman running on the beach" not indecent.[37] It found a *30-second* depiction of nude male buttocks "*very brief*" and thus not indecent "in context of a full length drama, the primary theme of which was the horrors of

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[36] The Commission has objected to the citation of these unpublished decisions, citing 47 C.F.R. § 0.445(e) ("unpublished opinions and orders of the Commission or its staff 'may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question *or by such persons against the Commission*'" (emphasis added)). Setting aside the fact that the ABC Affiliates clearly have notice of the staff decisions (as they have relied upon them throughout this litigation), this Court has made clear that, especially where constitutional rights are at stake, an agency cannot hide behind the unpublished nature of its actions. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *see also, e.g., Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 n.3 (4th Cir. 2007) ("[C]ourts typically look askance at an agency's unexplained deviation from a prior decision, even when the prior decision is unpublished.").

[37] Letter from Edythe Wise to Suzan Cavin, File No. 91100738 (Aug. 13, 1992) (together with associated complaint) (Br. App. 18a-21a) (complaint about the broadcast of the movie *Devices and Desires*).

war."[38] It found an evening news segment about strip clubs that cut from strip club dancers appearing on the witness stand during a trial to a scene at the strip club itself showing a woman's "completely bare" buttocks and, when she turned around, "complete genital nudity" for approximately 5-7 seconds not indecent.[39] Its decisions in the years following the *NYPD Blue* broadcast were consistent: It found the broadcast of a woman shown nude from the rear straddling her lover in a sex scene "not sufficiently graphic" to be found indecent.[40] It similarly found a "musical number during which the title character's naked torso and genital area are blocked by objects, furniture, and in one instance, by his hands" not "sufficiently graphic or explicit, or sustained, to rise to the level of being patently offensive."[41] These decisions—many of which

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[38] Letter from Norman Goldstein to David Molina, File No. 97110028 (May 26, 1999) (emphasis added) (Br. App. 1a-2a) (complaint about the broadcast of the movie *Catch-22*).

[39] Letter from Edythe Wise to Deborah Engleman, File No. 91060832 (Apr. 14, 1992) (together with associated complaint) (Br. App. 22a-26a). *See also, e.g.*, Letter from Edythe Wise to Donald E. Wildmon, File No. C11-144 (Feb. 23, 1990) (together with associated complaint) (Br. App. 27a-30a) (dismissing complaint against the program *The People Next Door* despite allegation that the program contained a scene with a woman "shown nude from the waist up").

[40] Letter from William D. Freedman, File No. EB-03-IH-0644 (Apr. 21, 2004) (together with associated complaint) (Br. App. 3a-7a) (complaint about the broadcast of the movie *Hollywood Wives: The Next Generation*).

[41] *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920, ¶¶ 6, 9 (2005) (broadcast of the film *Austin Powers: The Spy Who Shagged Me*).

were issued years *before* the challenged *NYPD Blue* broadcast, *compare* Petr. Br. at 25—are fully consistent with *Pacifica*.

2. Against the backdrop of *Pacifica* and the Commission's application of its indecency standard to televised nudity in the years that followed, the claim that broadcasters had sufficient notice that the FCC would find the challenged episode of *NYPD Blue* actionably indecent is untenable. Fully aware of the FCC's application of the indecency standard to televised nudity since 1978, broadcasters reasonably concluded that the brief, non-sexual depiction of adult buttocks in the opening minute of an hour-long drama broadcast during prime time in the show's tenth season and preceded by subject-matter warnings would not be deemed indecent.[42] No reasonable licensee in 2003 would have concluded otherwise.[43]

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[42] The ABC stations in particular had ample reason to believe that the broadcast of brief, non-sexual nudity would not be deemed indecent. After all, *Roots* aired on ABC stations in 1977, and the FCC never suggested that its multiple depictions of non-sexual nudity triggered indecency concerns. More than a quarter of a century later, ABC stations had no reason to suspect that the brief, non-sexual nudity in *NYPD Blue* would be problematic. That is particularly true because the series had been on the air for ten years in 2003, and numerous earlier episodes had included brief adult nudity. *See, e.g.*, Frequently Asked Questions About NYPD Blue, *available at* http://www.stwing.upenn.edu/~sepinwal/faq.html (noting that at least 20 characters appeared nude or partially nude during the series' 12-year run). Before 2008, the FCC had never suggested that any of those brief depictions would trigger indecency enforcement, and for the reasons discussed above, its body of indecency decisions supported the broadcasters' reasonable conclusion that brief, non-sexual nudity would not be found indecent.

[43] The Commission at once both chastises broadcasters for

Although the Commission touts its sensitivity to "context," the Commission displayed none in its consideration of the episode at issue. Most importantly, the *Forfeiture Order* discounted the facts that the nudity in question was exceptionally brief, it was not portrayed in a sexualized manner, and neither character in the scene engages in sexual or excretory activity or exhibits any sexual response.[44] During the scene, McDowell, standing in front of a mirror, removes

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citing staff decisions and insists that broadcast licensees "are highly sophisticated entities that operate in a heavily regulated market" and "can reasonably be expected both to pay particular attention to the agency's explication of its indecency standard and to be familiar with 'contemporary community standards for the broadcast medium.'" Petr. Br. at 19-20 (emphasis and citation omitted); *see also id.* at 34. The ABC Affiliates *have* paid close attention to everything the Commission has said about televised nudity: it is the Commission that appears to be conveniently and deliberately blind to its own staff's prior decisions implementing Commission policy.

[44] The Commission has elsewhere suggested to broadcasters that it will weigh these very same "contextual" factors and find no actionable indecency. In its *Omnibus Order*, for instance, the Commission held that the depiction of two characters (one male, one female) adjusting another character's breasts upwards was not indecent because

> the episode addresses the anxiety associated with a first date and Grace's friends' efforts to lend assistance—a topic that is not shocking, pandering, or titillating. Moreover, the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace.

Omnibus Order, 21 FCC Rcd 2664, ¶ 158 ("*Will & Grace*"); *see also id.* ¶ 226 (finding depiction of infant's buttocks not shocking, pandering, or titillating because it was "not sexualized in any manner whatsoever").

her robe as she prepares to shower, and McDowell's full buttocks are visible for approximately 2 2/3 seconds. McDowell then walks toward the shower and is seen in profile with her buttocks visible from one side for approximately 1.9 seconds. The scene shifts to Theo getting out of bed and walking to the bathroom; the camera then cuts back to McDowell preparing to step into the shower. McDowell's full buttocks are visible again for approximately 2 1/4 seconds. Thereafter, Theo and McDowell are both surprised and embarrassed, and McDowell's nudity is subsequently covered in the remainder of the scene.[45] In sum, McDowell's full buttocks are visible for less than 5 seconds, and her buttocks are visible from the side for less than 2 seconds, which, together, constitute approximately 12% of the entire 57-second scene and less than 0.25% of the entire hour-long episode. The Commission discounted the *de minimis* length of the scene relative to the full episode (no other part of which was found to be indecent).[46] In opposition to the *Notice*, the ABC Affiliates emphasized that the

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[45] Although the Government before this Court makes repeated mention of partial shots of the actress's breast, *see, e.g.*, Petr. Br. at 15-16, the FCC's indecency determination was predicated entirely on the brief depiction of her *buttocks*. *See Forfeiture Order*, ¶¶ 7, 18, Pet. App. 132a, 148a.

[46] Instead, the Government here again before this Court attempts to spice up its argument by citing the title of the challenged *NYPD Blue* episode, *Nude Awakening*, no fewer than five times (*see* Petr. Br. at 15, 25, 31, 38)—although the title was never broadcast to viewers. The title of the episode, however, cannot alter the fact that the nudity depicted in the opening seconds of the episode was wholly *non*-sexual. And the mere allusion to "nudity" in the episode's title lends no support to the FCC's indecency sanction, because the Commission itself has made clear that nudity is not *per se* indecent. *See* p. 35, *supra*.

exceedingly brief nudity at issue is manifestly not "dwelled on or repeated"—the second of the Commission's "patent offensiveness" factors. The Commission's own decisions suggested to broadcasters that the brevity of the nudity should have weighed against a finding of indecency.

The FCC likewise gave no weight to the theme of the challenged scene or its place in the broader story arc of the hour-long episode. It disregarded the fact that a later scene shows McDowell worrying about the incident with Theo, reading a book about raising children, and expressing her embarrassment to a colleague. She also asks Sipowicz whether Theo was all right when Sipowicz dropped him off at school, and he attempts to reassure her. Subsequent episodes continue the story arc dealing with Theo's adjustment to a new parental figure. The FCC's supposedly "contextual" analysis failed to give appropriate consideration to this brief scene as a part of the larger story arc[47]—another factor the Commission's prior decisions had weighed against an indecency finding. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975) ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . [A] motion picture must be considered as a whole, and not as isolated fragments or scenes of nudity."); *cf.* Letter from Norman Goldstein to David Molina, File No. 97110028 (May 26, 1999) (Br. App. 2a) (finding nudity in *Catch-22* not indecent in the context of "a full length drama, the primary theme of which was the horrors of war").

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[47] *See* n. 15, *supra*.

All of these (and other) "contextual" considerations should have compelled the conclusion that the brief nudity in *NYPD Blue* is not indecent within the meaning of the Commission's multi-factor indecency standard. The Commission's prior indecency decisions certainly suggested as much. Despite the Government's insistence that the FCC's "contextual" indecency standard is faithful to *Pacifica* and predictable to broadcast licensees, the *NYPD Blue* indecency order lacks any meaningful *constitutionally-compelled* sensitivity to context and cannot be reconciled with the Commission's application of its indecency standard to televised nudity in the years before 2003.

3. Consideration of Context Does Not Give the Commission License to Make Artistic Judgments

The vagueness of the FCC's indecency standard invites arbitrary and wholly subjective enforcement. As the body of its indecency decisions makes clear, the Commission adjusts and reweighs each of its patent offensiveness factors (or simply recites the factors with no explanation of how and why the Commission weighed them as it did) to reach an outcome in each case consistent with the Commission's subjective views about the artistic merit of a given work.

Although the Commission disclaims any intent to interfere with or oversee the artistic decisions made by broadcasters, its *Forfeiture Order*, like its Brief, reveals the agency's extreme preoccupation in this case with such matters as camera angles, "panning," and scene composition. *See* Petr. Br. at 15-16; *see also id.* at 19,

32 (describing nudity in *NYPD Blue* as "voyeuristic"). The Government seems particularly displeased, for example, that the child actor's face was displayed from behind and between the actress's legs and that in the second full shot of the actress's buttocks, the camera "'pans down . . . then pans up.'" Petr. Br. at 15 (quoting *Notice*, ¶ 10, Pet. App. 224a).[48] The Commission may well have preferred that the scene be framed and filmed differently, but the First Amendment does not permit the Commission to punish speech that it finds distasteful based on the Commissioners' entirely subjective "artistic" preferences. More to the point, whether the "panning," the camera angles, or the scene composition were artistically necessary to the scene are matters for the broadcaster to decide, not for the Government to dictate.[49]

The Commission's preoccupation with the artistic merit of the challenged *NYPD Blue* scene is intolerable but unsurprising. The agency's assertion of authority to make what amount to artistic judgments is, in fact, a centerpiece of its indecency regime. For example, the Commission approved the repeated use of "fuck," "shit," and other expletives in the film *Saving Private Ryan*

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[48] It bears noting that the shot from between the actress's legs that the Government dislikes occurs *after* all three of the extremely brief glimpses of nudity and thus cannot support the FCC's finding that this framing device "heighten[ed] the titillating and shocking nature of the scene." *Forfeiture Order*, ¶ 16, Pet. App. 144a.

[49] *Cf.* 47 U.S.C. § 326 ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

because (it decided) those expletives were "*integral* to the film[]" and "[*e*]*ssential* to the ability of the filmmaker to convey" his message; omitting them, the Commission said, would "alter[] the nature of the artistic work and diminish[] the power, realism, and immediacy of the film experience for viewers." *Saving Private Ryan*, 20 FCC Rcd 4507, ¶ 14 (emphases added). The Commission determined that far more limited expletives broadcast in a documentary about real jazz musicians, *The Blues*, were actionably indecent because the film's educational purposes "*could have been fulfilled* and all viewpoints expressed without the repeated broadcast of expletives." *Omnibus Order*, 21 FCC Rcd 2664, ¶ 82 (emphasis added). As the court of appeals noted, those evidently irreconcilable decisions almost certainly reflect the Commission's level of (dis)comfort with the subject matter and themes of the broadcasts. *See Fox*, Pet. App. 29a.

Having appointed itself the ultimate producer and director of all televised video as well as the arbiter of newsworthiness, artistic merit, and social acceptability, the Commission's indecency determinations predictably reflect the Commissioners' own subjective views about the merits of particular programming (or, worse still, their personal preferences). *See, e.g.*, Petr. Br. at 28-29 (defending varied indecency determinations concerning allegedly offensive terms such as "shit," "dickhead," and "kiss my ass" as "reasonably assess[ing] the . . . *social acceptability* of [the challenged] words" (emphasis added)). But if "social acceptability" is the Commission's new barometer, its determination that the brief *NYPD Blue* scene was "indecent" is even less

defensible. For decades, for example, the Coppertone girl's buttocks were exposed on billboards across America—and in plain sight of children.

As the North Carolina Supreme Court has observed:

> To hold that buttocks are private parts would make criminals of all North Carolinians who appear in public wearing "thong" or "g-string" bikinis or other such skimpy attire during our torrid summer months. Our beaches, lakes, and resort areas are often teeming with such scantily clad vacationers. We simply do not believe that our legislature sought to discourage a practice so commonly engaged in by so many of our people . . . .

State v. Fly, 501 S.E.2d 656, 659 (N.C. 1998). Not only is there no constitutional basis for the government to gauge, let alone control, "social acceptability," but any attempt to do so is doomed to failure.

The point is well-illustrated by *NYPD Blue* itself. The show was tremendously popular throughout its long run, attracting more than 11,300,000 viewers each

week on average during even its tenth season.[50] Yet the FCC acted here on about 100 (< 0.001% of viewership) form email complaints generated by an advocacy group complaining, inaccurately in fact, about the in-studio exposure of a child to full adult nudity. But the Commission's touchstone of "community standards" has never depended on what the most supersensitive or least tolerant deem socially acceptable. *See, e.g.*, *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, ¶ 10 (2000) (stating that the Commission's indecency standard turns on "an average broadcast viewer or listener and not the sensibilities of any individual complainant"). And it is well settled that First Amendment-protected speech depends on more "breathing space" than that to survive. *See, e.g.*, *NAACP v. Button*, 371 U.S. at 432-33.

The fact is any Commission yardstick for "acceptability" would measure only the Commissioners' personal preferences. But this Court has long made clear that the Commission "'may not impose upon [broadcasters] its private notions of what the public ought to [see and] hear.'" *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (quoting *Network Programming Inquiry*, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960)). "[J]udgments [about art and literature] are for the individual to make, not for the Government to decree . . . ." *Playboy*, 529 U.S. at 818.

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[50] *See* NYPD Blue, Wikipedia, *available at* http://en.wikipedia.org/wiki/Nypd_blue.

C. The Second Circuit's Vagueness Analysis Is Not in Conflict with *Holder*

Contrary to the Government's suggestion (Petr. Br. at 24-25), *Holder v. Humanitarian Law Project*, 561 U.S. ---, 130 S. Ct. 2705 (2010), does not draw the Second Circuit's vagueness rulings into question. *Holder* establishes that an as-applied vagueness challenge must be evaluated on the basis of the plaintiff's own speech and acts rather than the purely hypothetical speech or actions of others. In this case, unlike *Holder*, the broadcasters' vagueness challenges *are* predicated on their own speech (which the FCC has punished under its indecency standard), not on the hypothetical speech of others. (*Holder*, it bears noting, was a "preenforcement challenge," 130 S. Ct. at 2722, while the broadcasters' challenge here is a post-enforcement one.)

But nothing in *Holder*'s analysis or holding precludes a party whose conduct is *not* "clearly proscribed" by the challenged rule from bringing a facial vagueness challenge. And the broadcasts at issue in these cases were not "clearly proscribed" by the FCC's indecency standard. *Cf. Holder*, 130 S. Ct. at 2719 (noting that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice" and "certainly cannot do so based on the speech of others"). Indeed, the broadcasters' vagueness challenge to the indecency standard is not predicated on an argument that the standard "applies to a substantial amount of protected expression"—

essentially an overbreadth challenge[51]—but instead on the very argument that *Holder* made clear the plaintiffs in that case could have made (but did not): that the FCC itself has been unable to interpret and apply the "standard" in a consistent manner so that "'person[s] of ordinary intelligence'" can have "'fair notice of what is prohibited.'" *Holder*, 130 S. Ct. at 2720 (quoting *Williams*, 553 U.S. at 304). The inconsistency and unpredictability inherent in the FCC's indecency decisions give broadcasters no certain basis for determining at the outset whether their (constitutionally-protected) speech will be found to run afoul of the FCC's ever-shifting "contextual" analysis.

In any event, *Holder* distinguished the statute at issue in that case from statutes (like Section 1464) that proscribe "indecent" speech—statutory language the Court has elsewhere found to be unconstitutionally vague under the "more stringent vagueness test" applicable to regulation of speech. *See Holder*, 130 S. Ct. at 2719, 2720. *Holder* described specific terms such as "indecent" as inviting "'wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'" *Id.* at 2720 (quoting *Williams*, 553 U.S. at 306). *Holder*'s general observation rings true here. Even the FCC's purported narrowing construction (in the form of its multi-factor standard for patent offensiveness) empowers the

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[51] There may be overbreadth issues with the FCC's indecency enforcement policy as well. For instance, in *ABC* the FCC has sanctioned the brief depiction of buttocks but, anatomically, buttocks have no sexual or excretory function and, therefore, fall outside the narrowing construction the FCC has given to Section 1464's prohibition against the broadcast of "indecent" language. *See* pp. 30-32 & n. 32, *supra*.

agency to make "wholly subjective" and hopelessly inconsistent judgments about the artistic merit of constitutionally-protected speech. *See* pp. 43-47, *supra*.

III. The Constitutional Infirmities in the Commission's Indecency Regime Are Not Cured by the Regulatory Safe Harbor or by the Commission's Claim of Difficulty in Creating a More Precise Standard

It is no answer to suggest, as the Government does repeatedly (Petr. Br. at 20, 23, 36, 40-41, 48), that broadcasters uncertain about whether a particular broadcast will later be deemed "indecent" can simply air it after 10:00 p.m., during the FCC's regulatory "safe harbor." The Government points to nothing in this Court's Fifth Amendment jurisprudence to suggest that vagueness is ameliorated by the existence of alternative channels for disseminating the regulated speech.

The mere existence of the "safe harbor" does not advance the Government's First Amendment argument either. The Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 541 n. 10 (1980) (citing cases).[52] And this case readily illustrates why content-based "channeling"

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[52] *See also Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) ("time, place and manner" regulation "'may not be based upon either the content or subject matter of speech'" (quoting *Consolidated Edison Co.*, 447 U.S. at 536)).

is intolerable: The Government's argument would allow the Commission to channel (only) disfavored speech to the times of day when that speech is least likely to reach a broad audience, based on nothing more than the Commission's own tastes and preferences.[53] As the Court has declared even with respect to content-neutral bans on particular avenues of speech, speakers are "not to have the exercise of [their] liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of N.J. (Town of Irvington)*, 308 U.S. 147, 163 (1939).[54]

It is also no answer to suggest that the regulatory task before the Commission is a difficult one (*see, e.g.*, Petr. Br. at 7, 20, 35) and that complete precision cannot be expected (*id.* at 26-27). That alternative approaches, such as a rigid list of prohibited words and images, would present serious First Amendment problems does not excuse the Commission from formulating, and consistently applying, a standard that provides broadcasters with clarity and predictability. The Constitution demands no less. *Cf. Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781,

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[53] *Cf. City of Lakewood v. Plain Dealer Publg. Co.*, 486 U.S. 750, 763 (1988) ("[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.").

[54] The Government agreed with that proposition in *Pacifica*: Its brief took the position that "[a] prohibition of otherwise protected speech is not permissible under the First Amendment merely because it is limited to certain places or certain times." Br. for the United States, 1978 WL 206846 at *31 (citing *Erznoznik*, 422 U.S. at 209-12).

795 (1988) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency." (citing cases)).

In any event, history demonstrates that the Commission's concern about the "difficult task" of crafting an acceptable indecency standard is seriously overstated. For nearly 30 years after *Pacifica*, the FCC applied a restrained broadcast indecency policy, and its enforcement regime was subject to few legal challenges, let alone a finding of unconstitutionality. Only since 2004, when the FCC first departed from its long-restrained policy in favor of a wholly subjective "contextual" approach that leaves broadcasters (and courts) perpetually uncertain about what constitutes "indecent" speech, have the contours of the indecency policy come under sustained legal attack. Contrary to the Government's suggestion, it is clear that the Commission can do better than its current "contextual" standard.

Finally, the suggestion that broadcasters themselves will weed out broadcasts that lie close to "the indecency line" (Petr. Br. at 35) overlooks the fundamental problem with the Commission's current regime: Broadcasters simply cannot tell where that line will be drawn in any particular case and "must guess at its contours." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991). That shifting line necessarily chills constitutionally-protected speech.

* * *

It is ironic that the Government closes its Brief with an appeal to precedent and settled expectations, contending that a "'universal and long-established tradition of prohibiting certain conduct creates a strong

presumption that the prohibition is constitutional.'" Petr. Br. at 53 (quoting *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. ---, 131 S. Ct. 2343, 2347-48 (2011)). The Commission's indecency regime is precisely the antithesis of a "long-established tradition of prohibiting certain conduct." The very orders to which the Government now points as evidence of its reasonable, moderate, predictable, and understandable indecency regime in fact reflect hopeless inconsistency, lack of clarity, and results-oriented decision-making. And the Commission's own wildly inconsistent application of its indecency standard and the resulting lack of coherent precedent simply beget more subjective and unpredictable decision-making—precisely what the vagueness doctrine is intended to prevent. Where free speech rights hang in the balance, that uncertainty is flatly intolerable.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Wade H. Hargrove
Counsel of Record
Mark J. Prak
David Kushner
Julia C. Ambrose
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
150 Fayetteville Street
Suite 1600
Raleigh, N.C. 27601
919.839.0300
whargrove@brookspierce.com

November 3, 2011

APPENDIX

[Logo]

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

[May 26, 1999]

1800C1-TRW
97110028

Mr. David Molina
9852 Hot Springs Drive
Huntington Beach, CA 92646

Dear Mr. Molina:

This is in response to your complaint alleging that television station KCET, Los Angeles, CA, broadcast indecent material on October 25, 1997, between 9 p.m. and 11 p.m. In support of your complaint you submitted a video tape of the movie "Catch 22."

Under Section 503 of the Communications Act and Section 1464 of the U.S. Criminal Code, the Commission has authority to take action against the broadcast of indecent material. Recent cases reflect the Commission's ongoing commitment to enforce the statutory indecency prohibition where actionable violations occur. In determining whether a particular complaint can be acted upon, however, we are obliged to comply with the legal standards set out in this area by the courts. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Under these standards, indecent material has been defined as that which, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter alone does not render material indecent.

We have thoroughly reviewed your complaint and supporting material. Nudity itself is not per se indecent. Rather, the Commission must consider the context in which allegedly indecent material is presented. Here, the segment of the movie which included nudity was very brief and appeared in context of a full length drama, the primary theme of which was the horrors of war. Such material does not, in our view, rise to the level of patent offensiveness as to render the broadcast actionably indecent. Accordingly, while we recognize that the material may be offensive to some, we cannot find the necessary legal basis for further Commission action. The enclosure discusses the law with respect to indecent broadcasts and our enforcement procedures.

We appreciate your interest in this matter.

Sincerely,

/s/ Norman Goldstein
Norman Goldstein, Chief
Complaints and Political
Programming Branch
Enforcement Division
Mass Media Bureau

Enclosure

cc: Theodore D. Frank, Esq.
Arnold & Porter

[Logo] [Received Apr 26, 2004]

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau, Investigations
and Hearings Division
445 12th Street, S.W., Room 3-B443
Washington, D.C. 20554

April 21, 2004

In Reply Refer to:
EB-03-IH-0644

[Redacted Address]

Dear [Redacted]:

This letter responds to your complaint in which you allege that Station KUTV(TV), Salt Lake City, Utah, broadcast unlawful programming during its airing on October 19, 2003, at 8:30 p.m., of the film "Hollywood Wives: The Next Generation." Although we appreciate your concern, the information that you have submitted to us concerning this broadcast does not provide us with a legal basis to take action. Accordingly, for the following reasons, we deny your complaint.

The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions restricting obscene or indecent broadcasts. Specifically, title 18 of the United States Code, section 1464, prohibits the utterance of "any obscene, indecent or profane language by means of radio communications." 18 U.S.C. §1464.

Because the standard for proving that programming is indecent is less rigorous than that for proving obscenity, when considering broadcast complaints, the Commission generally focuses its analysis on indecency. In this regard, consistent with a subsequent statute and court case, section 73.3999 of the Commission's rules provides that no radio or television station shall broadcast indecent material during the period 6 a.m. through 10 p.m. *See* 47 C.F.R. § 73.3999. We note that the Commission's role in overseeing program content is limited, however, by the First Amendment to the United States Constitution and section 326 of the Communications Act of 1934, as amended (the "Act"), which prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression. *See* 47 U.S.C. § 326. Therefore, consistent with relevant court decisions, the Commission must exercise great care when evaluating programming for possible indecent material.

The Commission defines indecent speech as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. In determining whether the complained-of material is patently offensive, three factors are particularly relevant (1) the explicitness or graphic nature of the description or images; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock. The Commission applies these three factors as part of a balancing test to determine if the material is indecent. *See In the Matter of Industry Guidance On the Commission's Case Law Inter-*

preting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd 7999 (2001).

In response to your complaint, on March 8, 2004, we sent a letter of inquiry to KUTV Holdings, Inc., the licensee of the station, which provided us with a recording of the program. After reviewing that recording, we have concluded that the material cited in your complaint, in context, is not sufficiently graphic and/or sustained to meet the Commission's standard for indecency. Accordingly, we are denying your complaint.

We appreciate and recognize your concern. To assist you further, we include an information sheet that discusses the law with respect to indecent and obscene broadcasts and our enforcement procedures. In addition, there is a way that one can avoid 'objectionable programming. Most television and cable networks voluntarily rate much of their programming to alert viewers if a show contains language or other material that a viewer may find inappropriate. The Act requires that all televisions 13 inches or larger manufactured after 1999 be equipped with a V-chip, which can use these ratings to block individual programs or channels. (Set-top boxes are available to allow consumers with older sets that lack this capability to use V-chip technology.) For further information on how to restrict access to objectionable programming, as well as other useful facts, see http://www.fcc.gov/parents/. We also encourage you to convey your concerns directly to

station management, because viewers' opinions often influence management's programming decisions.

Thank you for your interest.

Sincerely,

/s/ William D. Freedman
William D. Freedman
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau

Enclosure

cc: Howard F. Jaeckel, Esq.

[FCC Enforcement Bureau
2003 DEC 8 P 3:46
Investigations and
Hearings Division]

December 1, 2003

RE: Formal Complaint

FCC
Enforcement Bureau, Investigations and
Hearings Division
445 12th Street, SW
Washington, D.C. 20554

To Whom it May Concern:

I found the following show offensive and indecent. I do not know the name of the show, I happened to be browsing channels when I discovered this scene and quickly changed the channel. The scene was of a man and woman making love. It showed a woman nude from the back straddling her partner while sitting up and engaging in sexual intercourse. I found this scene pornographic, and not appropriate on network television at anytime. However, the prime-time display of this material made it even worse. Please register my formal complaint against this programming. The broadcast information is listed below:

Date: 10/19/2003

Time: 8:30pm

Channel: KUTV, Salt Lake City, UT (CBS)

Sincerely,

[Redacted]

CBS [Illegible Enforcement Bureau stamp]

CBS
1515 BROADWAY
NEW YORK, NEW YORK 10336-5794

(212) 845-3595
FAX: (212) 846-1907
hjaeckel@cbs.com

HOWARD F. JAECKEL
VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL

Delivered by Hand

William H. Davenport
Chief, Investigations and Hearing Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Suite 3-B443
Washington, D.C. 20554

Re: Response to Letter of Inquiry
File No. BB-03-1H-0644

Dear Mr. Davenport: April 7, 2004

This is in response to a Letter of Inquiry (the "Inquiry Letter") from the Enforcement Bureau concerning a complaint (the "Complaint") alleging that KUTV(TV), Salt Lake City, Utah (the "Station") broadcast indecent material on October 19, 2003, at approximately 8:30PM Mountain Time, in violation of 18 U.S.C. § 1464 and 47 CFR § 73.3999. The response is respectfully submitted on behalf of KUTV Holdings, Inc. ("KUTV Holdings"),[1] the Station's

[1] KUTV Holdings, Inc. is an indirect subsidiary of CBS Broadcasting Inc., the licensee of several stations in the Viacom

licensee; CBS Broadcasting Inc. ("CBS"), operator of the CBS Television Network; and Viacom Inc. ("Viacom"), the ultimate parent company of KUTV Holdings and CBS, and the ultimate owner of the 39 television stations constituting the Viacom Television Stations Group.[2]

The Complaint attached to the Inquiry Letter did not name a particular program and was sent by an unidentified person who claimed to be "browsing channels" before he or she "quickly changed the channel" on seeing the complained of material. However, based on the date and time of the program cited in the Complaint, the complainant may have been referring to a brief scene contained within a two hour, made-for-television movie entitled "Hollywood Wives: The Next Generation" (the "Program"), which was transmitted by the CBS Television Network from 9:00PM to 11:00PM Eastern Time, and broadcast by KUTV(TV) between 8:00 and 10:00PM Mountain

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Television Stations Group. CBS Broadcasting Inc. is an indirect wholly-owned subsidiary of Viacom.

[2] The Communications Act defines a "licensee" simply as the "holder of a . . . station license." 47 U.S.C. § 153 (24). The Inquiry Letter, however, defines "Licensee" far more broadly, to include "KUTV Holdings, Inc." and any "predecessor-in-interest, affiliate, parent company, wholly or partially owned subsidiary, other affiliated company or business, and all owners., including, but not limited to, partners or principals" as well as "all directors, officers, employees, or agents, including consultants and any other persons working for or on [its] behalf." In the interest of full cooperation with the Inquiry Letter, this response provides information on behalf of Viacom and its subsidiaries, but neither Viacom nor its subsidiaries waives any potential objections, in connection with the present or future inquiries, to the reach of this overly broad definition of the term "Licensee."

Time, on October 19, 2003. The Licensee is providing information on this Program only because it aired on the Station at the date and time named in the Complaint, and not because CBS concurs that the Complaint accurately describes the Program, or merits further inquiry under the Commission's longstanding enforcement procedures concerning the alleged broadcast of indecent material.[3]

To the extent the Complaint is directed toward "Hollywood Wives: The Next Generation," we believe that it mischaracterizes both the Program, when viewed in full context, as well as the brief scene that the Complainant purportedly encountered while "browsing." CBS respectfully submits that the scene did not constitute a graphic depiction of sexual activity that could be considered "patently offensive"

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[3] Although the Commission has recently improvidently moved away from its long established requirement that a tape or transcript must be supplied by a complainant before the FCC will consider an indecency complaint, *Capstar TX Limited Partnership*, Notice of Apparent Liability for Forfeiture, FCC 04-36 (rel. March 18, 2004) ("*Capstar*"), it has always required complaints to be "documented" with some type of credible "supporting material." *Compare Industry Guidance on the Commission's Case Law Interpreting 18 US.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8015 (2001) ("*Industry Guidance*"). Having a demonstrable basis for Commission inquiry is a basic due process requirement that the Commission previously has recognized as being necessary to have "a sufficient basis for identifying prima facie violations of the statute before requiring broadcasters to respond to complaints." *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd. 930, 938 n.49 (1987). The Licensee hereby notes its objection to issuance of the Inquiry Letter without a tape, transcript, or any substantive support having been provided by the Complainant, and does not waive any due process or other objections to the inadequacy of the Complaint.

as measured by contemporary standards for the broadcast medium. The imposition of any sanction based on the scene in question, which comprised approximately 10 seconds of a two hour movie, would be contrary to law, inconsistent with FCC precedent, and would unconstitutionally infringe on the First Amendment rights of the Station and CBS.

Responses to the Commission's specific inquiries are set forth below. In accordance with the Inquiry Letter, this response is signed by Howard F. Jaeckel, Vice President, Associate General Counsel of CBS Broadcasting Inc., and Assistant Secretary, Viacom Inc., and verified by his declaration, attached hereto as Exhibit 1.

1. State whether the Licensee broadcast the material described in the Complaint over Station KUTV (TV) on October 19, 2003, at 8:30PM and/or any other date between 6AM and 10PM.

As noted above, the Station broadcast the CBS Television Network movie "Hollywood Wives: The Next Generation" between 8 and 10PM on October 19, 2003. Without accepting complainant's characterization of the nature of the programming, the movie contains a scene of approximately 10 seconds duration that is broadly consistent with the one described in the Complaint.[4] CBS believes that the

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[4] However, because the complainant admittedly only saw a brief, out-of-context snippet of the program while "browsing channels," did not know the program's name, and "quickly changed the channel" on happening upon the scene that he or she found offensive, the possibility' of the complainant's being mistaken about the station and network in question cannot be excluded. The Complaint did not include a tape or transcript of the program, included no detailed description of the program,

scene in the Program was not "indecent" in light of the principal factors generally considered by the Commission in evaluating indecency complaints, because: (1) the material was neither explicit nor graphic; (2) it did not dwell on the depiction of sexual activities and there was no depiction of sexual organs; and (3) it did not pander or titillate, nor was it presented for its shock value.[5]

2. With regard to each broadcast referred to in response to Inquiry 1 above, if the programming described in the Complaint does not accurately reflect the material broadcast over Station KUTV(TV), describe any inaccuracies.

Assuming for purposes of this response that the Complaint referred to the Program as broadcast on KUTV, the inflammatory description of the programming in the Complaint does not accurately characterize any actual telecast on that station. The Complaint's very brief description of the scene in the unnamed program refers to a "pornographic" depiction of "sexual intercourse," which would suggest that

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and provided no other supporting information. Ultimately, therefore, a Commission determination that the Complaint in fact concerns the Program discussed herein—rather than other programming that may have been running on another channel at approximately the same time—would be based only on its own inference. Given the FCC's longstanding policy of "not independently monitoring broadcasts for indecent material," *see*, *Industry Guidance*, *supra*, 16 FCC Rcd at 8015, it would be improper for the Commission to pursue an indecency enforcement action where the complaint, standing alone, is insufficient to state a *prima facie* case.

[5] *See*, *Industry Guidance*, *supra*, 16 FCC Rcd at 8003 (2001). The Commission has noted that, in assessing each of these factors, "the overall context of the broadcast in which the disputed material appeared is critical. *Id*.

the depiction was graphic. In fact, while the Program includes a scene depicting two characters engaged in sexual activity, it is brief, non-graphic, does not involve exposure of sexual organs or frontal nudity, and is comparable to other programming broadcast by the major networks and elsewhere on television. Accordingly, any suggestion that the Program includes either a "graphic" depiction of sexual activity, or that the Program, taken in full context, is patently offensive as measured by contemporary community standards for the broadcast medium, is erroneous.

3. With regard to each broadcast referred to in the response to Inquiry 1 above, provide any and all compact discs, tapes, transcripts, or other Documents reproducing or discussing the material reflected in the Complaint, plus the fifteen (15) minutes of material broadcast immediately before and after the material referred to in the complaint. Provide any and all such recordings on compact disc (CD-R) and a written transcript of the material contained in each recording.

Pursuant to discussions with the Commission staff, CBS is submitting herewith a VHS tape of the movie "Hollywood Wives: The Next Generation," as the film was transmitted by the CBS Television Network, and broadcast by KUTV, on October 19, 2003.[6]

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[6] Providing this videotape of the Program does not waive any objections Viacom or its subsidiaries may have to the overbreadth of the Commission's request for a 15-minute "buffer zone" beyond the programming putatively described in the Complaint. By extending its inquiry beyond the bounds of a complaint, as it does here, the Bureau shills the burden to the Licensee to provide a tape and transcript of the complained of material, plus additional material on either side thereof. This

4. State whether the Licensee broadcast all or any portion of the material described in the complaint over any station licensed to it other than station KUTV(TV).

Because of the non-specific and unsubstantiated nature of the Complaint, there is no adequate basis on which the Commission may properly conclude that any CBS owned or affiliated stations broadcast the material described therein. However, subject to Viacom's objection to the scope of this inquiry—an inquiry which improperly expands the Commission's reach beyond the complaint—a list of the Viacom owned television stations that broadcast the Program is attached hereto as Exhibit 1. Each of these stations broadcast "Hollywood Wives: The Next Generation," on October 19, 2003; stations located in the Eastern Time Zone (WCBS-TV, KYW-TV, WBZ-TV, WWJ-TV, WFOR-TV, KDKA-TV, WJZ-TV, WWHO-TV and WJMN-TV) broadcast the Program beginning at 9:00PM; stations in the Central Time Zone (WBBM-TV, KTVT(TV), WCCO-TV, KCCO-TV, KCCW-TV, KEYE-TV and WFRV-TV) broadcast the Program beginning at 8:00 PM; stations in the Mountain Time Zone (KCNC-TV and KUSG(TV) broadcast the Program beginning at 8:00PM; and stations in the Pacific Time Zone (KCBS-TV and KPIX-TV) broadcast the Program beginning at 9:00 PM.

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approach abandons critically important restraints in this sensitive area and greatly magnifies the potential for unlawful government intrusion into programming matters.

5. If the answer to Inquiry 4 above is "yes," provide, for each broadcast referred to in the response to Inquiry 4, above:

   a. the call sign, community of license and licensee;

   b. the date(s) and time(s) of the broadcast(s);

   c. if only a portion of the material was broadcast, describe the material so broadcast;

   d. if the Complaint does not accurately reflect the material broadcast, describe any inaccuracies; and

   e. any and all compact discs, audio tapes, transcripts or other Documents reproducing, discussing, or otherwise relating to the material so broadcast over the station. Provide any such recordings on compact disc (CD-R). Also provide a written transcript of the material contained in the recording.

See responses to Inquiries 1 through 4, above regarding the characterization of the broadcast. The list of Viacom owned and operated stations set forth in Exhibit I provides each station's call sign, community of license, address, and facility ID number. In discussions with CBS outside counsel, the Enforcement Bureau staff indicated that production of a VHS tape of the Program sufficiently responds to the production requests set forth in Inquiry 5.

6. Identify each station licensed to an entity or individual other than the Licensee that had the contractual right with the Licensee to air the material in question and, for each such station, state whether the Licensee has reason to believe that the station did not air the material in question and the basis for that belief.

All affiliates of the CBS Television Network had the contractual right to broadcast the Program on a "first call" basis. To the best of our knowledge, all such stations (which are listed in Exhibit 2, along with their call signs, communities of license, and addresses) broadcast the Program as scheduled by the Network, with the exception of WBNS(TV), Columbus, Ohio.

7. Provide copies of all Documents that provide the basis for or otherwise support the responses to Inquiries 1-6 above.

As stated above, the Enforcement Bureau has indicated, in discussions with CBS outside counsel, that production of a VHS tape of the Program, along with lists of the Viacom owned and CBS affiliated stations that aired the Program, sufficiently responds to the production requests set forth in the Inquiry Letter.

Very truly yours,

/s/ Howard F. Jaeckel

DECLARATION

I, Howard F. Jaeckel, in my capacity as Vice President, Associate General Counsel of CBS Broadcasting Inc. ("CBS"), and Assistant Secretary, Viacom Inc. ("Viacom"), hereby declare under penalty of perjury that to the best of my knowledge, information and belief, the responses submitted to the March 8, 2004, letter of inquiry from William H. Davenport, Chief, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, to KUTV Holdings, Inc., are true and complete.

/s/ Howard F. Jaeckel
Howard F. Jaeckel

[Aug 13 1992]

8310-TR
91100738

Ms. Susan Cavin
905-46E 7th Avenue
Garner, NC 27529

Dear Ms. Cavin:

This is in reference to your complaint against television station WUNC, Chapel Hill, NC. In that complaint you brought to our attention the station's broadcast of certain possibly indecent material October 13 and 20, 1991, at 10:30 a.m. during parts two and three of "Devices and Desires." In support of your complaint you submitted a video tape of the above programs.

Under Section 503 of the Communications Act and Section 1464 of the U.S. Criminal Code, the Commission has authority to take action against the broadcast of indecent material. Recent cases reflect the Commission's ongoing commitment to enforce the statutory indecency prohibition where actionable violations occur. In determining whether a particular complaint can be acted upon, however, we are obliged to comply with the legal standards set out in this area by the courts. See e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Under these standards, indecent material has been defined as that which, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter alone does not render material indecent.

We have thoroughly revived your complaint and supporting material. On the basis of that review, we conclude that the broadcast material identified in

your complaint is not actionably indecent. Accordingly, while we recognize that the material in your complaint may be offensive to many, we cannot find the necessary legal basis for further Commission Action.

You indicate the programs were also broadcast an October 10 and 17, 1991, at 9:00 p.m. respectively. A federal court has held unconstitutional the Commission's rule prohibiting the broadcast of Indecent Material 24 hours a day. Action for Children's Television v. FCC, 932 F. 2d 1504 (D.C. Cir. 1991). The court has remanded that case with instructions that the Commission establish a "safe harbor" during which material that may be indecent, but is nevertheless constitutionally protected, may be broadcast. Therefore, until such time as a new safe harbor goes into effect, the Commission's enforcement authority against indecent broadcasts does not extend to material broadcast often 8:00 p.m. or before 6:00 a.m. See Action for Children's Television v. FCC, 852 F. 2d 1332 (D.C. Cir. 1988).

I emphasize, however, that the Commission takes seriously its obligation to enforce the statutory prohibition of broadcast indecency and continues to evaluate complaints regarding indecent broadcasts. For example, we recently initiated proceedings against several licensees for the broadcast of indecent material during daytime hours.

We appreciate your concern regarding this matter.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

S. Cavin
905-46E 7th Ave.
Garner, NC 27529
October 21, 1991

[91100738]
[Illegible Stamp]

Gentlemen;

I have enclosed a copy of a television movie which contains material I believe to be illegal for the broadcast medium, especially during morning hours.

The videocassette contains parts two and three of "Devices and Desires", a movie which was shown on a noncable channel, WUNC-TV 4, Chapel Hill, (Research Triangle Park.)

Part two was broadcast on Sunday morning, October 13, 1991 from 10:30am to 11:30am, and on Thursday October 10, 1991 from 9pm to 10pm. Part three was shown on Sunday morning, October 20, 1991 from 10:30 am to 11:30am. Also on Thursday October 17, 1991 from 9pm to 10pm.

This movie contains scenes of a topless woman in bed with her lover, with her breast very clearly exposed, several scenes of a topless woman running on the beach, and several scenes of a nude female corpse, with the breasts clearly exposed.

Parts 4 through 6 of this movie "Devices and Desires" will be broadcast on Sunday mornings October 27, November 3rd and 10th, 1991 from 10:30 am to 11:30 am.

This and many other similar movies and programs on WUNC-TV containing full frontal and rear nudity have convinced me the channel is not serving the public interest and is especially harmful to children.

Please take action against WUNC-TV 4 for the broadcast of this material, especially in the morning hours.

I understand the license of this channel is now being considered for renewal. I would like to request the license not be renewed.

Sincerely,
S. Cavin

Address of WUNC-TV 4
10 TW Alexander Dr., P.O. Box 14900
Research Triangle Park, NC 27709-4900

[14 APR 1992]

8310-TRW
91060832

Mrs. Deborah Engelman
1083 Ormewood Avenue S.E.
Atlanta, GA 30316

Dear Mrs. Engleman:

This is in reference to your complaint against WAGA-TV, Atlanta, GA. In that complaint you brought to our attention the station's broadcast of certain possibly indecent material the evening of June 5, 1991, at 6:00 p.m. during "Eyewitness News."

Under Section 503 of the Communications Act and Section 1464 of the U.S. Criminal Code, the Commission has authority to take action against the broadcast of indecent material. Recent cases reflect the Commission's ongoing commitment to enforce the statutory indecency prohibition where actionable violations occur. In determining whether a particular complaint can be acted upon, however, we are obliged to comply with the legal standards set out in this area by the courts. See e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Under these standards, indecent material has been defined as that which, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter alone does not render material indecent.

We have thoroughly reviewed your complaint and supporting material. On the basis of that review, we conclude that the broadcast material identified in your complaint not actionably indecent. Accordingly

while we recognize that the material in your complaint may be offensive to many, we cannot find the necessary legal basis for further Commission action.

We appreciate your concern regarding this matter.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

[Received
Jun 18, '91
MMB Enforcement
Control Section Stamp]

June 6, 1991

Mass Media Bureau
Federal Communications Commission
ATTENTION: COMPLAINTS AND
COMPLIANCE DEPARTMENT
1919 "M" Street, Room 8210
Washington, D.C. 20554

RE: Genital Nudity on TV

Dear Sir/Madam:

I am writing to inform the Mass Media Bureau of a graphic or televised showing of nude female dancers—"strippers". This took place on the 6:00 PM evening "Eyewitness" news of the CBS affiliate here in Atlanta—WAGA TV—on June 5, 1991. I have described the broadcast to the local monitoring station of the FCC and was informed that this graphic showing of female stripers, who were shown totally nude from the waist down, was definitely illegal.

The nude strippers were shown during a segment on the trial of Mr. Hans Krause here in Atlanta. During this trial, dancers from a local club were called to testify. As the reporter was giving the details of their testimony, the camera was at first showing these women in the courtroom on the witness stand. Then as the reporter was continuing his story on their testimony, the courtroom scene was gone, and in its place was a scene from a strip joint. The camera showed from the back the lower torso of a woman

dancing. The buttocks were completely bare. Then the dancer turned around, revealing complete genital nudity. This nude dancing scene lasted approximately 5-7 seconds. During the program no warning was given that explicit scenes of nudity were going to be broadcast. Watching this program with me was my young son, aged 4 1/2.

The news director responsible for this broadcast was Mr. Bud McEntee. I managed to speak with him on the telephone this morning. His explanation for this scene was that the reporter wanted to "show pictorially what he was talking about." One must therefore wonder if the reporter believes that adults in Atlanta do not know what strippers actually do. Or perhaps this "pictorial explanation" was meant for children whose parents had managed thus far in their innocent lives to shield them from these aspects of the adult world. Thanks to Eyewitness News, my son is now an "eyewitness" to the world of strip clubs. Mr. McEntee was completely unapologetic and expressed no concern for my feelings as a viewer of WAGA-TV.

This unjustifiable use of sex to titillate the news raises questions not only about the competence of WAGA TV's employees, but the policies by which their broadcasting decisions are made.

I am requesting that you investigating this matter, for the sake of those people who want to watch prime time television without being assaulted by graphic

obscenity. I would appreciate being kept informed of whatever action you take. Thank you.

Sincerely,

/s/ Deborah Engleman
Mrs. Deborah Engleman
1083 Ormewood Ave. SE
Atlanta, Georgia 30316

cc: Mr. Anthony Malara
Audience Viewing Affiliates
CBS, New York

Mr. Jack Sander
President and General Manager
WAGA-TV, Atlanta

[FCC Mail Section
FEB 23 3:42PM '90
Dispatched By]

8310-TRW

Mr. Donald E. Wildmon
American Family Association
P. O. Drawer 2440
Tupelo, MS 38803

Dear Mr. Wildmon:

This is in reference to your complaint against WCBI-TV, Columbus, MS. In that complaint you brought to our attention the station's broadcast of certain possibly indecent material the evening of September 18, 1989, at approximately 7:30p.m.

Under Section 503 of the Communications Act and Section 1464 of the U.S. Criminal Code, the Commission has authority to take action against the broadcast of indecent material. A number of recent cases reflect the Commission's ongoing commitment to enforce the statutory indecency prohibition where actionable violations occur. In determining whether a particular complaint can be acted upon, however, we are obliged to comply with the legal standards set out in this area by the courts. See e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Under these standards, indecent material has been defined as that which, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Subject matter.

We have thoroughly reviewed your complaint and supporting material. On the basis of that review, we conclude that the broadcast material identified in your complaint not actionably indecent. Accordingly while we recognize that the material in your complaint may be offensive to many, we cannot find the necessary legal basis for further Commission action.

We appreciate your concern regarding this matter.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

[AFA Fish Logo]

September 20, 1989

Federal Communications Commission
Mass Media Bureau
Enforcement Division
Complaints and Investigations Branch
1919 M Street, N.W.
Washington, D.C. 20554

Dear Sir or Madam:

I am submitting to you a video tape recording of the television program, "The People Next Door", broadcast on WCBI-TV at 7:30 p.m. CST on September 18, 1989. This program was broadcast in violation of the federal indecency laws.

The program used the double entendre with reference to sexual acts. More egregious, however was the gratuitous use of nudity in the show. During one scene a woman's dress is suddenly removed and she is shown nude from the waist up. While the scene was brief, it nonetheless sets the stage for more flagrant and regular use of nudity on broadcast television.

Television is such a pervasive and influential medium that such abuses of the public trust cannot go unnoticed. This material was specifically designed to attract an audience and was used during promotional advertisements for the program. The presentation of this material during the early evening hours was clearly intended to test the limits of decency on broadcast television. Material that is so clearly exploitive presented at an hour when children are expected to be in the audience demonstrates

a true lack of responsibility on the part of the broadcaster.

I am asking that you take the necessary action against this broadcaster and impose administrative sanctions as well as refer this matter for possible criminal action. If you should need any additional information, please do not hesitate to contact me. I await your prompt resolution of this matter.

Sincerely,

/s/ Donald E. Wildmon
Donald E. Wildmon
Executive Director

RESPONDENT'S BRIEF

No. 10-1293

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS CBS TELEVISION NETWORK AFFILIATES ASSOCIATION AND NBC TELEVISION AFFILIATES

ROBERT A. LONG, JR.
Counsel of Record
JONATHAN D. BLAKE
JENNIFER A. JOHNSON
ENRIQUE ARMIJO
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, N.W.
Washington, DC 20004
rlong@cov.com
(202) 662-6000

November 2011

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Law Library

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondents make the following disclosures:

The CBS Television Network Affiliates Association (the "CBS Affiliates") and the NBC Television Affiliates (the "NBC Affiliates") are non-profit, incorporated member associations of broadcast television stations that are affiliated, respectively, with the CBS and NBC Television Networks. The CBS Affiliates represent approximately 230 stations; the NBC Affiliates represent approximately 225 stations.

Neither the CBS Affiliates nor the NBC Affiliates has issued any shares of stock or debt securities to the public, and neither has a parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 10

ARGUMENT 12

I. The FCC's New Indecency Policy Is Unconstitutionally Vague. 12

A. The FCC's reinterpretation of its authority to enforce the indecency statute demonstrates that the new policy is impermissibly vague. 13

B. The FCC's "patently offensive" factors lack constitutionally adequate standards. 18

C. The FCC's indecency interpretations under the new policy fail to give broadcasters fair notice as to what programming will be found indecent 22

D. The Government's attempts to save the FCC's new indecency policy from a finding of vagueness are unavailing. 26

II. The FCC's New Indecency Policy Violates The First Amendment 28

A. The new indecency policy goes well beyond the constitutional limits suggested by *Pacifica*. 30

B. The New Indecency Policy Cannot Survive Intermediate Scrutiny. 32

1. The policy does not further a substantial government interest. 33

2. The policy is not narrowly tailored. 36

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

CASES

Ashwander v. TVA,
297 U.S. 288 (1936) 29

Brown v. Ent. Merchs. Ass'n,
131 S. Ct. 2729 (2010) 33, 35, 36

CBS et al. v. FCC et al., No. 06-3575 (3d Cir.
Nov. 2, 2011) 16

City of Lakewood v. Plain Dealer Publ'g Co.,
486 U.S. 750 (1988) 26

Clark v. Martinez,
543 U.S. 371 (2005) 13

Denver Area Educ. Telecomm.
Consortium v. FCC,
518 U.S. 727 (1996) 37

Edenfield v. Fane,
507 U.S. 761 (1993) 33

Entm't Software Ass'n v. Blagojevich,
469 F.3d 641 (7th Cir. 2006) 37

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 35, 37

FCC v. Fox Television Stations, Inc.
129 S. Ct. 1800 (2008) .....*passim*

FCC v. League of Women Voters,
468 U.S. 364 (1984) 32

FCC v. Pacifica Found.,
438 U.S. 726 (1978) .....*passim*

Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), rev'd and remanded, 129 S. Ct. 1800 (2008) 8, 34

Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) ..... *passim*

Kolender v. Lawson, 461 U.S. 352 (1983) 12

Leocal v. Ashcroft, 543 U.S. 1 (2004) 13

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 35

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 29

Reno v. ACLU, 521 U.S. 844 (1997) 3, 13, 19

Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) 30, 34

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 33, 36

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000) 37, 38

United States v. Stevens, 130 S. Ct. 1577 (2010) 18

United States v. Williams, 553 U.S. 285 (2008) 12

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 13

CONSTITUTION AND STATUTES

U.S. Const.:

Amend. I ..... *passim*

Amend. V (Due Process Clause) ..... *passim*

18 U.S.C. § 1464 ..... *passim*

47 U.S.C. § 326 21

47 U.S.C. § 503 17

47 USC § 303(x) 37

Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) 1

FCC DECISIONS

Citizen's Complaint Against Pacifica Found., 56 F.C.C.2d 94 (1975) 3

Complaints against Various Broadcast Licenses Regarding their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975 (2004) 2

Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507 (2005) ..... *passim*

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006) ..... *passim*

E. Educ. Radio (WUHY-FM),
24 F.C.C.2d 408 (1970) 3

"Golden Globe Awards" Program Complaints,
18 F.C.C.R. 19,859 (Enf. Bureau, 2003) 6

In re Pacifica Found.,
2 F.C.C.R. 2686 (1987) 4

Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464,
16 F.C.C.R. 7999 (2001) ..... *passim*

Infinity Broad. of Pa.,
2 F.C.C.R. 2705 (1987) 4

L.M. Commc'ns of S.C., Inc.,
7 F.C.C.R. 1595 (1992) 4

Regents of Univ. of Cal.,
2 F.C.C.R. 2703 (1987) 4

WGBH Educ. Found.,
69 F.C.C.2d 1250 (1978) 4, 14, 31, 39

WPBN/WTOM License Subsidiary,
15 F.C.C.R. 1838 (2000) 4, 14, 31

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Eggerton, "Pappas Won't Air CBS's 9-11 Doc.,"
Broadcasting & Cable (Sept. 7, 2006) 20

FCC Child Safe Viewing Act Report,
24 F.C.C.R. 11,413 (2009) 38

INTRODUCTION

The CBS Television Network Affiliates Association (the "CBS Affiliates") and the NBC Television Affiliates (the "NBC Affiliates") are associations of broadcast television stations that are affiliated, respectively, with the CBS and NBC Television Networks. Members of the CBS Affiliates operate approximately 230 television stations; members of the NBC Affiliates operate approximately 225 stations. All of the NBC Affiliates' members, and a large majority of the CBS Affiliates' members, are owned by entities other than the CBS and NBC Television Networks.

The Federal Communications Commission ("FCC" or "Commission") has adopted a revised indecency policy that applies to members of the CBS and NBC Affiliates. Individual members of the CBS and NBC Affiliates have been the subject of indecency investigations by the FCC, and members devote substantial resources to efforts to understand and comply with the FCC's indecency policy.

For decades, the Commission has taken a restrained approach to indecency enforcement, grounded in this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Recently, however, the FCC has adopted a new indecency policy that lacks clear and consistent standards and infringes on the constitutional rights of broadcasters. The FCC's new policy, combined with a huge increase in the maximum monetary penalty for indecency, from $32,500 to $325,000, *see* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006), has dramatically escalated the risks

borne by broadcasters. The FCC has also warned that "multiple violations of [its] indecency rule by broadcasters may well lead to the commencement of license revocation proceedings." *Complaints against Various Broadcast Licenses Regarding their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4982, ¶ 17 (2004) ("*Golden Globes Order*").

The FCC's expanded indecency policy is both unconstitutionally vague and a constitutionally impermissible restriction on broadcaster speech. The FCC's revised policy, combined with the enormous increase in the maximum penalty for violating the policy, may deter local television stations from covering live local events of interest to their communities.[1] Particularly in the case of live network programming, local television stations generally have no ability to avoid broadcasting fleeting expletives but nevertheless face liability for any such content under the FCC's new policy. In addition, local stations often have no way to ascertain in advance whether a particular network-provided program episode contains fleeting nudity.[2] In these circumstances, the FCC's indecency policy has an "obvious chilling effect on free speech,"

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[1] The FCC has declared that "there is no outright news exemption from [its] indecency rules" under the new enforcement regime. *See* Pet. App. 100a.

[2] Network affiliates generally lack effective technical or legal means to alter programming provided to them for broadcast by the networks. Affiliate television stations commit to accept and air such programming through contractual agreements with the networks, subject to a limited right to preempt network programming in advance.

because the threat of severe sanctions "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

STATEMENT OF THE CASE

1. Congress enacted the indecency statute, 18 U.S.C. § 1464, as part of the Radio Act of 1927. The FCC did not engage in active indecency enforcement until the 1970s, and even then, enforcement actions were rare. *See E. Educ. Radio (WUHY-FM)*, 24 F.C.C.2d 408, 412, ¶ 11 (1970).

a. The scope of the FCC's authority to enforce the indecency statute was challenged in 1975, when the agency found that a radio station licensed to the nonprofit Pacifica Foundation had violated the statute with its midafternoon broadcast of comedian George Carlin's 12-minute "Filthy Words" monologue. In its *Pacifica* decision, the Commission indicated that it intended to play a limited role in regulating content, and that "the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes." *Citizen's Complaint Against Pacifica Found.*, 56 F.C.C.2d 94, 100, ¶ 16 (1975).

This Court narrowly upheld the FCC's decision. The Court's decision emphasized that the broadcast repeated the expletives "over and over again." *Pacifica*, 438 U.S. at 729. Two of the five justices who voted to uphold the FCC's action did so on the assumption that the agency would "proceed cautiously, as it has in the past." *Pacifica*, 438 U.S.

at 761 n.4 (Powell, J., concurring in part and concurring in the judgment); *id.* at 760-61 (distinguishing the "isolated use of a potentially offensive word" from "the verbal shock treatment administered by [the] respondent").

b. Post-*Pacifica*, the FCC continued to "proceed cautiously," and assured broadcasters that it "intend[ed] strictly to observe the narrowness of the *Pacifica* holding." *WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254, ¶ 10 (1978). For decades, the FCC repeatedly concluded that isolated or fleeting expletives did not violate the indecency policy. *See, e.g.*, *Regents of Univ. of Cal.*, 2 F.C.C.R. 2703 (1987); *In re Pacifica Found.*, 2 F.C.C.R. 2686, 2699, ¶ 13 (1987) ("speech that is indecent must involve more than an isolated use of an offensive word"); *Infinity Broad. of Pa.*, 2 F.C.C.R. 2705, 2705 ¶ 7 (1987) (same); *L.M. Commc'ns of S.C., Inc.*, 7 F.C.C.R. 1595 (1992) (broadcast "contained only a fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction"). The FCC applied the same restrained approach to isolated instances of nudity. *See, e.g.*, *WGBH Educ. Found.*, 69 F.C.C.2d, at 1254, ¶ 10 & n.6 (observing "narrowness of the *Pacifica* holding" in finding that programs containing alleged "nudity and/or sexually oriented material" were not indecent); *WPBN/WTOM License Subsidiary*, 15 F.C.C.R. 1838, 1840-41, ¶¶ 9-10 & n.5 (2000) (discussing whether the material in question was "isolated or fleeting," and declaring that "presentation of adult frontal nudity prior to 10 p.m. *per se* [does not] constitute[] indecent programming").

c. In 2001, the FCC issued a policy statement intended to "provide guidance to the broadcast industry." This guidance "describes the analytical approach the Commission uses in making indecency determinations." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999, 7999, ¶ 1 (2001) ("Industry Guidance"). According to the Industry Guidance, material is indecent if it (1) "describe[s] or depict[s] sexual or excretory organs or activities," and (2) is "patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002, ¶¶ 7-8. The FCC's Industry Guidance states that the FCC determines "patent offensiveness" by considering three factors: whether the material (1) is explicit or graphic in describing sexual or excretory organs or activities; (2) "*dwells on or repeats*" the description "*at length*"; and (3) appears to pander, is used to titillate, or is presented for shock value. *Id.* at 8003, ¶ 10 (emphases added).

The FCC stated that "[n]o single factor generally provides the basis for an indecency finding." *Id.* Instead, "[e]ach indecency case presents its own particular mix of these, *and possibly other*, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent." *Id.* (emphasis added). The Commission's Industry Guidance did not identify the "other" factors that could "possibly" be relevant in a particular case. Nor did the Industry Guidance distinguish between utterances and images in explaining its patent offensiveness analysis. *Compare id.* at 8010-11, ¶ 20 (utterances aired over a

radio program), *with id.* at 8011, ¶ 21 (images of sex organ models).

In discussing the "dwells on or repeats at length" factor, the Industry Guidance—consistent with the FCC's longstanding interpretation and this Court's decision in *Pacifica*—expressly distinguished between a "persistent focus on sexual or excretory material" and isolated, "passing or fleeting" references. *Id.* at ¶ 17; *see also id.* (where sexual or excretory references "have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency").

d. In 2003, the FCC's Enforcement Bureau found that the musician Bono's use of the words "really fucking brilliant" during a live broadcast of the Golden Globe Awards was not indecent. In reaching that conclusion, the Bureau noted that it had "previously found that fleeting and isolated remarks of this nature do not warrant Commission action." *"Golden Globe Awards" Program Complaints*, 18 F.C.C.R. 19,859, 19,861 ¶ 6 (Enf. Bureau, 2003). It also found that the utterance "did not describe sexual or excretory organs or activities," but instead was used to "emphasize an exclamation." *Id.* at 19,861, ¶ 5.

2. In 2004, the FCC changed course. The full Commission reversed the Enforcement Bureau's 2003 decision involving Bono, finding that the word "fuck" and its variations "inherently ha[ve] a sexual connotation" and "invariably invoke[] a coarse sexual image." Thus, the FCC determined, the word and its variations presumptively meet both the first component of the indecency definition ("depict or describe sexual activities") and one of the "patently

offensive" factors (an "explicit or graphic" description or depiction of sexual activities). *Golden Globes Order*, 19 F.C.C.R. at 4979, ¶ 9. The FCC concluded that broadcasts of the term "fuck" and its derivatives were indecent regardless of whether they were fleeting—thus negating the "dwells on or repeats" factor for those terms. *Id.* at 4980-81, ¶¶ 12-13.

In 2006 and 2008, applying its newly-expanded indecency enforcement policy and contrary to its historical, *Pacifica*-based approach, the FCC found the three broadcasts at issue in this case to be indecent. All three broadcasts aired in 2002 or 2003, prior to the FCC's 2004 announcement of a change in policy.

a. In 2006, the FCC found indecent two fleeting uses of "fuck" that aired during Fox's broadcasts of the Billboard Music Awards in 2002 and 2003. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2691-2694, ¶¶ 100-111 (2006) ("*Omnibus Order*"); *see also* Pet. App. 90a-91a, 48a. In the same decision, the FCC came to a similar conclusion regarding a single use of the word "shit" that also aired during the 2003 program. The FCC found that the word "shit" is an "invariably vulgar, graphic, and . . . coarse excretory image," thus meeting both the first part of the indecency definition and the first "patently offensive" factor. *Omnibus Order*, 21 F.C.C.R. at 2688-89, ¶¶ 91, 96; *see also* Pet. App. 48a. Accordingly, uses of the word "shit," like "fuck," were indecent whether fleeting or not.

b. In 2008, the FCC found indecent a clip from a 2003 episode of "NYPD Blue" that was "slightly less than seven seconds" in length and briefly depicted a woman's buttocks in a nonsexual manner. Pet. App. 120a; *id.* 126a. In so finding, the Commission found that *Pacifica* "pose[d] no barrier to a finding of indecency" because "*Pacifica* involved spoken expletives, not images of nudity." *Id.* 49a.

3.a. Several Respondents sought judicial review of the FCC's Order finding that the two Billboard Music Awards broadcasts were indecent.[3] The court of appeals held that the FCC did not provide an adequate explanation for its change in policy, and therefore its action was arbitrary and capricious under the Administrative Procedure Act. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

After granting the FCC's petition for certiorari, this Court reversed the court of appeals' decision and remanded for consideration of the constitutional issues. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). The Court held that the APA did not require the Commission to justify the "expan[sion] of its enforcement" by "reasons more substantial than those required to adopt a policy in the first instance." *Id.* at 1810. Rather, it was sufficient for the FCC to provide "reasons for

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[3] The FCC's Order also found that episodes of CBS's "The Early Show" and ABC's "NYPD Blue" were indecent. The FCC subsequently reversed its finding with respect to "The Early Show" and dismissed the complaint against "NYPD Blue" on procedural grounds. *See* Pet. App. 10a & n.5.

expanding the scope of its enforcement activity [that] were entirely rational." *Id.* at 1813. The Court remanded to allow the court of appeals to address the "separate question" of the "lawfulness [of the policy] under the Constitution." *Id.* at 1812.

b. On remand, the court of appeals unanimously held that the new indecency policy is unconstitutionally vague. Pet. App. 2a, 18a. The court of appeals concluded the policy fails to give broadcasters fair notice of "what is prohibited so that [they] may act accordingly." *Id.* 19(a) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). By "provid[ing] no clear guidelines as to what is covered," the policy "forces broadcasters to steer far wider of the unlawful zone, rather than risk massive fines." *Id.* The FCC's application of its "patently offensive" analysis to the broadcasts before the court "consisted of repetition of one or more of the factors without any discussion of how" they were being applied. *Id.* 24a. In addition, the Commission applied its "presumptive prohibition" of the words "fuck" and "shit" with "little rhyme or reason," leaving broadcasters "to guess whether an expletive" will be found to violate the policy. *Id.* 26a-27a. The court of appeals found "ample evidence in the record that the FCC's [new] indecency policy has chilled protected speech." *Id.* 31a.[4]

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[4] In a separate case, the ABC Network and the ABC Television Affiliates petitioned for judicial review of the Commission's finding that the 2003 "NYPD Blue" broadcast was indecent. Pet. App. 120a. The Second Circuit found that there was "no significant distinction between this case and *Fox*," and that (...continued)

SUMMARY OF THE ARGUMENT

The FCC's new indecency policy is unconstitutionally vague. The policy also imposes an unconstitutional restriction on broadcaster speech.

1.a. For decades prior to the broadcasts at issue, the FCC, guided by this Court's decision in *Pacifica*, maintained that fleeting expletives and fleeting nonsexual nude images were not indecent. In rejecting that longstanding approach, the FCC applied its new indecency policy to broadcasts that were not actionable at the time they aired. As a result, Respondents not only lacked notice that fleeting expletives and images would be found indecent; they had notice to the contrary.

The Government concedes that Respondents lacked fair notice of the new policy, but argues that this is irrelevant because the FCC did not impose a fine on the Fox Respondents. But the FCC's finding that broadcasters willfully violated a criminal statute may have adverse consequences apart from the levying of a fine. In *Pacifica*, the Court decided the constitutional issue even though the FCC did not impose a fine. *See* 438 U.S. at 730. Moreover, the FCC has fined the ABC Respondents more than $1.2 million for the "NYPD Blue" broadcast.

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because it had earlier held in the *Fox* case that the FCC's new indecency policy was impermissibly vague, it was bound by that decision. *Id.* 124a. The Government sought this Court's review of both the *Fox* and *ABC* cases, and the Court granted certiorari.

b. Even as to future broadcasts, the FCC's expanded indecency policy is unconstitutionally vague because no reasonable broadcaster can determine what speech is prohibited. The FCC applies its indecency policy on a *post hoc*, case-by-case basis, giving unspecified and variable weight to enumerated and unenumerated factors. The record in this case demonstrates that the FCC's approach significantly chills protected broadcaster speech. Pet. App. 31a-34a.

c. The FCC's application of its new policy confirms that it relies on subjective judgments. In one case, for example, the Commission found that a viewer advisory was sufficient to weigh against finding that repeated uses of "fuck," "shit," and several other expletives were indecent, but in the "NYPD Blue" broadcast before the Court the FCC discounted the effectiveness of a similar advisory. Under the FCC's new policy, certain terms are inherently indecent even when used a single time, unless the FCC determines that those terms are "essential to the nature of the work," or that omitting them would have "diminished the power, realism, and immediacy" of the broadcast.

2.a. The newly expanded enforcement regime goes well beyond the First Amendment limits suggested by this Court's decision in *Pacifica*. In determining that fleeting expletives and nonsexual nude images can be punished, the FCC ignored this Court's emphasis in *Pacifica* on the narrowness of its holding. *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring).

b. Nor can the new policy survive the intermediate scrutiny standard applicable to broadcaster speech. Precisely stated, the Government's interest supporting the new policy is in preventing children from being exposed to *fleeting* expletives and nudity. This interest is not substantial, especially given that the new policy regularly permits the airing of such material outside of the Commission's safe harbor period. The new policy also burdens substantially more speech than is necessary to further the Government's asserted interest. Less restrictive, content-neutral alternatives, such as targeted blocking technologies, exist to empower parents to shield their children from material that the parents deem inappropriate.

ARGUMENT

I. The FCC's New Indecency Policy Is Unconstitutionally Vague.

The Due Process Clause of the Fifth Amendment requires that laws and regulations be set forth with "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A law is impermissibly vague when it is "so standardless that it authorizes or encourages seriously discriminatory enforcement," *United States v. Williams*, 553 U.S. 285, 304 (2008), and when the government's interpretation of a statute's operative terms rely on "untethered" and "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) ("*HLP*") (citing *Papachristou v. Jacksonville*, 405 U.S. 156

(1972)). A law or regulation that "threatens to inhibit the exercise of constitutionally protected rights," such as "the right of free speech," is subject to "a more stringent vagueness test." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).[5]

The FCC's new indecency enforcement policy fails to satisfy these constitutional requirements. Under the FCC's policy, a reasonable broadcaster cannot determine whether speech is, or is not, prohibited. That is true today, and it certainly was true at the time of the broadcasts at issue in this case, when decades of FCC decisions put broadcasters on notice that fleeting expletives and brief nude nonsexual images were *not* indecent.

A. The FCC's reinterpretation of its authority to enforce the indecency statute demonstrates that the new policy is impermissibly vague.

The Fox and ABC Respondents aired the broadcasts at issue in 2002 and 2003. For decades prior to those broadcasts, the FCC maintained that a single airing of a fleeting expletive "should not call

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[5] Vagueness is of special concern when a criminal statute is at issue. *See Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); *see also Pacifica*, 438 U.S. at 739 (noting that Section 1464 is a "criminal statute"). This Court has declined to adopt multiple interpretations of statutes that apply in both criminal and civil contexts, noting that such an approach would "render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). *See also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

for [it] to act under the holding of *Pacifica*." *See WGBH Educ. Found.*, 69 F.C.C.2d at 1254, ¶ 10 n.6; *see also* Pet. Br. 5 (acknowledging that "after *Pacifica*, the Commission implemented an enforcement policy under which only deliberate, repetitive use" of expletives "would be deemed actionably indecent"). The FCC applied *Pacifica*'s "shock treatment" requirement to images as well as utterances, finding that brief, nonsexualized nude images were not indecent. *See, e.g.*, *WGBH Educ. Found., id.*; *Omnibus Order*, 21 F.C.C.R. at 2718-19, ¶ 226 (broadcast of child's buttocks not indecent because, *inter alia*, it did not "dwell on or repeat" an excretory organ description "at length," but rather "shows the relevant segment once and then moves on to other videotapes"); *WPBN/WTOM License Subsidiary*, 15 F.C.C.R. at 1840, ¶ 9 (full frontal adult nudity in "Schindler's List" not indecent); *accord*, Industry Guidance 16 F.C.C.R. at 8010, ¶ 21 ("very graphic sex organ models" used to "simulate the use" of condoms and diaphragms were "not presented in a pandering, titillating or vulgar manner") (citing *King Broad. Co.*, 5 F.C.C.R. 2971 (1990)).[6]

Respondents and other broadcasters thus had notice, based on decades of FCC decisions cabined by this Court's decision in *Pacifica*, that broadcasts of fleeting expletives or images would not be punished. Without advance notice, the FCC drastically

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[6] *See also* Pet. Reply 2 ("[T]he FCC has . . . *expanded* its indecency policy to cover isolated offensive words *and images* where circumstances warrant . . .") (emphases added).

expanded its construction of the indecency statute's coverage and applied that interpretation to the three broadcasts in this case, thus criminalizing the broadcast of material that was not actionable at the time it was aired. This is worse than lack of fair notice, and worse even than no notice at all.

The FCC's prior, *Pacifica*-cabined enforcement decisions are directly relevant to the vagueness inquiry in this case. Two Terms ago, in *Skilling v. United States*, the Court surveyed "the origin and subsequent application" of the honest-services fraud statute to determine whether the conduct of the convicted defendant could be interpreted to come within those decisions. "Reading the statute to proscribe a wider range of offensive conduct [than prior decisions understood the statute to have criminalized], we acknowledge, would raise the due process concerns underlying the vagueness doctrine." *Id.*, 130 S. Ct. 2896, 2926, 2931 (2010); *see also id.* at 2940 (Scalia, J., joined by Thomas and Kennedy, JJ., concurring in part and concurring in the judgment) (statute void for vagueness because inconsistent interpretations of it "provide[] no ascertainable standard for the conduct it condemns") (quotation marks omitted). In *Bouie v. City of Columbia*, the Court recognized that even if the text of the applicable statute is clear—which is not the case here, *see* Argument Part I.B. *infra*—"unforeseeably and retroactively expand[ing] a statute by judicial construction" presents a "potentially greater deprivation of the right to fair notice" than the garden-variety vagueness case where "the uncertainty . . . resulted from vague or overbroad language in the statute itself." *Id.*, 378 U.S. 347,

351-52 (1964) (internal citations omitted). The same principle applies to retroactively expanding a statute by agency construction.

In view of the FCC's longstanding enforcement policy, Respondents had "no reason to suspect that conduct clearly outside the scope" of the FCC's enforcement of the indecency statute to that point—*i.e.*, fleeting expletives and images—"w[ould] be retroactively brought within it" by the FCC's revised construction of its authority to enforce the statute. *Id.* at 352. Indeed, the FCC's longstanding policy found substantial support in *Pacifica*. *See Pacifica*, 438 U.S. at 750 ("[w]e have not decided that an occasional expletive . . . would justify any sanction"); *id.* at 742 (plurality opinion); *id.* at 760-61 (Powell, J., concurring in part and concurring in the judgment) (Court's decision "did not speak to cases involving the isolated use of a potentially offensive word").

The Government *concedes* lack of fair notice in this case. *See* Pet. Br. 28, n.3 ("To be sure, Fox did not have reasonable notice at the time of the broadcasts that the Commission would consider non-repeated expletives indecent."). *See also* Pet. App. 93a (FCC "acknowledge[s] that it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast.").[7] The Government

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[7] The Government does not expressly concede lack of fair notice as to ABC, but as noted above the FCC's longstanding precedents do not distinguish between fleeting expletives and fleeting nudity. *See also CBS et al. v. FCC et al.*, No. 06-3575, slip op. at 6-12, 26-27, 57-69 (3d Cir. Nov. 2, 2011) (reaffirming that FCC indecency policy drew no distinction between (...continued)

attempts to minimize the significance of this concession by noting that the FCC declined to impose monetary penalties against Fox. Pet. Br. 28, 31. However, the agency made no such determination with respect to ABC and the *NYPD Blue* episode. Instead, the FCC imposed more than $1.2 million in fines on the ABC stations that aired that episode. Moreover, the mere fact that the FCC declined to impose a monetary penalty for what it found to be "willful" violations of the indecency statute does not establish that its indecency findings have no collateral consequences for the broadcasters involved. *See Omnibus Order*, at 2691-95, ¶¶ 105-114; *see also id.*, at 2722 n.179 (Fox's proposed change in its live programming practices "does not excuse the indecency violation in this case"). Such findings of wrongdoing can harm a broadcasters' reputation with viewers and advertisers. In addition, though the FCC stated that its indecency findings would not adversely impact the license renewals of the Fox stations, nothing bars the agency from using its findings to justify enhanced penalties in the event of future violations of the policy.[8]

This Court has never held that the government's decision to forbear from exercising its asserted authority to punish speech defeats a challenge to that authority. Indeed, in *Pacifica* itself the

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expletives and nudity in finding that fleeting material was not indecent).

[8] *See* 47 U.S.C. § 503 (granting Commission authority to increase forfeiture penalties in the case of "any history of prior offenses"); *see also Omnibus Order*, 21 F.C.C.R. at 2669, ¶ 20.

Commission "did not impose formal sanctions," *Pacifica*, 438 U.S. at 730, but the Court nevertheless considered the important constitutional issues implicated by the FCC's action. The Court should do the same here. *See United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*.")

B. The FCC's "patently offensive" factors lack constitutionally adequate standards.

The Commission's "patently offensive" factors fail to inform broadcasters of the weight that the FCC will give to each factor, of which factor (if any) will be dispositive in any particular case, and of what "other" factors the agency may consider relevant (or perhaps even dispositive) in assessing whether to punish a broadcaster for airing content.

1. The stated purpose of the three "patently offensive" factors set out in the Industry Guidance is to "provide guidance to the broadcast industry" regarding the FCC's interpretation of the indecency statute. Industry Guidance, 16 F.C.C.R. at 7999, ¶ 1. By the FCC's own admission, however, in applying the factors to a particular broadcast, the agency "weigh[s] and balance[s]" the factors "on a case-by-case basis," and "[i]n particular cases, one or two of the factors may outweigh the others." *Id.* at 8004, ¶ 13. The Commission further states that in some cases it will rely on "other" unspecified factors in addition to the three it has defined. *Id.* The FCC is the sole definer of the "contemporary community standards for the broadcast medium" that the agency

uses to "measure" patent offensiveness. Pet. Br. 19-20 (emphasis omitted); *see also* Pet. Reply 4-5. The FCC thus measures patent offensiveness on a *post hoc* basis, potentially weighing its three factors, and possibly others, differently in each case, based on "standards" that it is effectively free to revise or ignore. This essentially subjective approach falls short of what due process requires.

Reno v. ACLU confirms the "vagueness inherent in the open-ended term 'patently offensive.'" 521 U.S. at 873. As was the case there, the FCC's definition of "patently offensive" "omits any requirement that 'patently offensive' material . . . lack serious literary, artistic, political, or scientific value."[9] *Id.* at 865. Nor do the three "patently offensive" factors set out in the Industry Guidance resolve the inherent vagueness that this Court recognized in *Reno*. As demonstrated above, the "coarseness" factor is "invariably" met by some

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[9] Although the FCC, in applying its new indecency policy, has asked whether content has "any social or artistic merit" in considering the "pander, titillate, or shock" component of its "patently offensive" test, *see* Pet. App. 147a; *see also Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512, ¶¶ 11-13 (2005) (discussed *infra* at Argument Part I.C.), nothing compels the Commission to consider social or artistic merit in every case and its determinations under the new policy have been procedurally and substantively erratic. *See Omnibus Order*, 21 F.C.C.R. at 2684-85, 2686-87, ¶¶ 74-78, 82, 84-85 (placing burden on broadcaster to "demonstrate[] it was essential to the nature of an artistic or educational work" to air expletives); *see also infra* Argument Part I.C. (discussing "The Blues").

expletives, but not others. The "dwells on or repeats at length" factor applies in some cases but not others, depending on the "coarseness" of the aired expletive. And the "pander, shock, or titillate" factor is relevant only when the Commission deems it so. *See* Industry Guidance, 16 F.C.C.R. at 8014, ¶ 23 ("The absence of a pandering or titillating nature, however, will not necessarily prevent an indecency determination . . . ."); *see also infra* Argument Part I.C.2. (discussing inconsistencies in FCC's "pander, shock, or titillate" determinations). These factors generate confusion, not guidance. They do not cure the inherently vague definition of "patently offensive."

2. The arbitrary nature of the FCC's new indecency policy has significantly chilled protected broadcaster speech. *See, e.g.*, Brief for *Amici Curiae* Public Broadcasters, *FCC v. Fox Television Stations, Inc.* (2008) (No. 07-582), pp. 13-16 (uncertainty arising from indecency enforcement caused public broadcasters to edit or refrain from airing a number of educational programs); Eggerton, "Pappas Won't Air CBS's 9-11 Doc.," Broadcasting & Cable (Sept. 7, 2006). The court of appeals, mindful of this Court's admonition that impermissibly vague regulations "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked" (Pet. App. 19a, quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)), pointed to "ample evidence in the record" demonstrating that the Commission's change in policy has caused broadcasters to self-censor across a range of programming types. Pet. App. 31a-34a. As the court noted, these chilling effects have been "profound," and have adversely affected coverage of

"news and public affairs programming," and even political debates and local memorial services. *Id.* 31a-32a.

By expanding its enforcement policy well beyond *Pacifica*'s bounds, and by doing so in a highly subjective manner, the FCC is achieving indirectly what it is barred from doing directly: "interfer[ing] with the right of [broadcasters'] free speech." 47 U.S.C. § 326.

3. It is no answer to claim that the FCC's *post hoc* "context-based" methodology is consistent with the approach this Court approved in *Pacifica*. As the court of appeals recognized, the context in which an utterance or image occurs will change with each use, but the *standards* against which that utterance or image is assessed for enforcement purposes may not. Pet. App. 30a. Calling an opponent's argument "bullshit" is, in context, quite different from Ms. Richie's description of her Prada purse. But the new policy treats both utterances the same, because the use of "shit" or a derivative "invariably invokes a course [*sic*] excretory image in *any* context." *Omnibus Order*, at 2693, ¶ 114 n.168 (emphasis added). In the Commission's balancing, the role of context depends on the expletive uttered; context is relevant, says the FCC, except when it is not. These considerations are standardless—and thus impermissibly vague.

C. The FCC's indecency interpretations under the new policy fail to give broadcasters fair notice as to what programming will be found indecent.

The FCC's application of its new indecency policy confirms that its "patently offensive" determinations under the new standard are "wholly subjective." *HLP*, 130 S. Ct. at 2720. Broadcasters are left to guess as to what broadcasts the Commission will find indecent.

1.a. In its 2006 *Omnibus Order* applying the new policy, the Commission found that use of the terms "shit," "fuck," and their derivatives by musicians during the PBS Martin Scorsese-directed documentary "The Blues" was indecent because, *inter alia*, the terms "invariably invoke" "coarse" sexual or excretory images. *Omnibus Order*, 21 F.C.C.R. at 2684-85, ¶¶ 74-76. Earlier, however, in applying the same policy, the FCC rejected an indecency challenge to a broadcast of the film "Saving Private Ryan" because it concluded that the actors' use of the same words that the FCC found indecent in "The Blues"—indeed, use that far exceeded that of the musicians in "The Blues"—was "[e]ssential . . . to convey to viewers the extraordinary conditions in which the soldiers conducted themselves," and "[d]eleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of*

the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507, 4512-13, ¶ 14 (2005) (hereinafter "*Saving Private Ryan" Order*). Given this lack of clarity in application, no broadcaster can determine in advance which broadcasts the FCC will deem "patently offensive." Broadcasters are thus unable to assess their potential liability under the indecency statute for having aired a particular program.

b. A similar subjectivity riddles the Commission's determinations as to which expletives are inherently "coarse" and therefore more likely to offend. For example, the Commission found under the new policy, without explanation, that the words "dick" and "dickhead," although descriptive of a "sexual organ," "did not have the same level of offensiveness as the 'F-Word' or 'S-Word'" and accordingly were not indecent. *Omnibus Order*, 21 F.C.C.R. at 2696-97, ¶ 127. Merely restating this determination highlights its essential subjectivity. The only "level" of "offensiveness" relevant to an indecency finding is the Commission's.[10]

c. The Commission's *post hoc* application of "other" factors is similarly standardless. In the

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[10] Similarly, the FCC assumes that the words "pissed off" and "ass," like the words "fuck" and "shit," "describe sexual or excretory organs or activities." But "pissed off" and "ass," in the FCC's view, do not do so "coarsely or graphically" and therefore do not patently offend—at least when used as a "slang expression that means angry" or "to denigrate or insult" respectively. *See Omnibus Order*, 21 F.C.C.R. at 2712-13, ¶¶ 196-98. These inconsistent applications affirm the inherent standardlessness of the new policy's indecency definition. No reasonable broadcaster can take comfort in such "guidance."

"Saving Private Ryan" case, the Commission gave significant weight to the "aural and visual viewer advisory and voluntary parental code" that aired prior to and during the program—evidence, by the FCC's lights, that "parents had ample warning that this film contained material that might be unsuitable for children." *"Saving Private Ryan" Order*, 20 F.C.C.R. at 4513, ¶ 15. But in the "NYPD Blue" proceeding now before the Court, the FCC concluded that any benefit provided by a similar advisory was outweighed by the "graphic, repeated, pandering, titillating, and shocking nature of the scene," *regardless* of the effectiveness of the advisory. Pet. App. 147a-148a. The advisory's effectiveness in warning parents was given substantial weight in the former case, but little if any weight in the latter case.

2. In *HLP*, this Court noted that Congress "took care to add narrowing definitions to the [statute at issue] over time," which "increased the clarity of the statute's terms." *HLP*, 130 S. Ct. at 2720. The Commission, however, has taken no such steps to clarify its indecency definition. Instead, the new policy *expands* the FCC's definition of indecency by finding that, contrary to its prior, more limited approach, "fuck," "shit" and their variations "*inherently* ha[ve] sexual or excretory connotations" and thus, regardless of context, "depict or describe sexual activities." *Omnibus Order*, 21 F.C.C.R. at 2684, ¶ 74 (emphasis added). Further, any use of those terms is sufficiently "coarse" to meet the "patently offensive" prong's first requirement and thus is presumptively indecent. *Golden Globes Order*, 19 F.C.C.R. at 4979, ¶ 9. This interpretive expansion is far removed from the narrowing

constructions that the Court found saved the material-support statute in *HLP*. *Cf. HLP*, 130 S. Ct. at 2720.

The FCC's expansion of its indecency definition came at the expense of clarity. Despite the 2004 conclusion under the new policy that a single, fleeting use of the term "fuck" is inherently sexual and thus presumptively indecent, multiple uses of the term and its variations were found not indecent in "Saving Private Ryan." This is so due to the new policy's exception permitting the broadcast of expletives—even "numerous," inherently coarse expletives, *see "Saving Private Ryan" Order*, 20 F.C.C.R. at 4512, ¶ 13—where they are "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance," and thus "not pandering and [] not used to titillate or shock." *Omnibus Order*, 21 F.C.C.R. at 2686, ¶ 82; *"Saving Private Ryan" Order*, 20 F.C.C.R. at 4512, ¶ 13.[11] Given such standardless, *post hoc* decisionmaking based on "shifting criteria," broadcasters are "left to guess whether an expletive will be deemed 'integral' to a program" and thus permissible. Pet. App. at 27a (citing *Grayned*, 408 U.S. at 108); *see also City of*

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[11] The FCC noted that the "Saving Private Ryan" characters' repeated use of expletives "realistically reflect the soldiers' strong human reactions" to their conditions. *"Saving Private Ryan" Order*, 20 F.C.C.R. at 4512-13, ¶ 14. Left unexplained, however, is how depictions in a fictional film could more "realistically reflect strong human reactions to conditions" than the words of actual historical figures in a documentary film such as "The Blues."

Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1988).

D. The Government's attempts to save the FCC's new indecency policy from a finding of vagueness are unavailing.

The Government advances several procedural and substantive arguments in support of its contention that the court below erred in finding the new indecency policy void for vagueness. None of these arguments is persuasive.

1. Relying on this Court's decision in *HLP*, the Government claims that the court below erred by considering the FCC's new indecency policy "as applied to the conduct of others" instead of Respondents' conduct. Pet. Br. 24-25 (citing *HLP*, 130 S. Ct. at 2718-2719). In so doing, the Government claims, the Second Circuit treated an as-applied challenge as a facial challenge. But this case is quite different from *HLP*. The Second Circuit's vagueness analysis in this case, which analyzed the FCC's application of the new indecency policy to actual broadcasts, is readily distinguishable from the Ninth Circuit's in *HLP*, in which the court of appeals "*imagine[d]* protected expression that f[ell] within the bounds" of the material-support statute's terms. *Id.* at 2714 (quoting court of appeals) (emphasis added). The Court in *HLP* stated that the plaintiffs there "c[ould] not seek refuge in imaginary cases." *Id.* at 2721. But there is nothing "imaginary" or "hypothetical" (*id.*) about the more than $1 million in fines facing the ABC television stations that aired the episode of "NYPD Blue" that

is before the Court, or the other actual FCC enforcement decisions analyzed by the court of appeals.

2. The Government also claims that ABC and Fox had fair notice that the content in their broadcasts would violate the Commission's indecency standards because they and other broadcasters have historically avoided airing such content in the past, and have internal standards-and-practices departments charged with ensuring that such content is not aired whenever possible. Pet. Br. 34. This argument misses the point.

The issue, for purposes of a vagueness analysis, is not whether broadcasters have adopted internal standards for their own programming, but whether they had constitutionally adequate notice that fleeting expletives and nudity would violate the *FCC's* indecency standards at the time of the broadcasts in question—despite decades of FCC's findings to the contrary. As noted above, the Government correctly concedes that Fox lacked any such notice. *See* Pet. Br. 28, n.3. This concession refutes the Government's argument that broadcasters' prophylactic measures to prevent the airing of fleeting expletives, or Fox's bleeping the expletives in question when the broadcasts aired later on the West Coast, "concretely demonstrate" that Fox knew that "fuck" and "shit" were indecent under the FCC's policy. *See* Pet. Br. 28. The FCC decisions the Government points to as "further guidance that further clarifies the [indecency] standard" for broadcasters (Pet. Br. 33) were issued under a regime in which the FCC consistently held that a single, non-literal use of an expletive or a brief

nonsexualized nude image was not indecent. Accordingly, the cases the Government cites did not provide Respondents notice that the broadcasts in question would be found indecent, but rather the opposite.[12] *See supra* at Argument Part I.A.

* * *

The subjective nature of the FCC's interpretation of its indecency policy renders that policy unconstitutionally vague. A person of ordinary intelligence cannot understand what the Commission means by "patently offensive" if its interpretation of that term can change without notice, or if it relies on factors the agency can apply as it chooses in the case before it. Nor can broadcasters, who are exposed to potential criminal liability and millions of dollars in forfeitures.

II. The FCC's New Indecency Policy Violates The First Amendment.

The FCC's new indecency policy is also an unconstitutional restriction on the free speech rights

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[12] The Government argues that because the FCC's *"Saving Private Ryan" Order* came after the broadcasts at issue, the broadcasters cannot rely on it to show a lack of fair notice in an as-applied vagueness challenge. Pet. Br. 28. But in seeking this Court's review, the Government cited to FCC decisions issued after the broadcasts at issue as evincing the Agency's effort to "narrow potentially vague or arbitrary interpretations" of the new policy. Pet. 26 (citing a 2005 broadcast). The Government should not be permitted to use post-2003 decisions to demonstrate adequate notice and, at the same time, argue that broadcasters should be barred from using them to show a lack of fair notice.

of broadcasters. Some Respondents have invited the Court to use this case as an occasion to reconsider the level of constitutional protection afforded to broadcaster speech. *See, e.g.*, ABC et al. Br. in Opp. 29-32; CBS, Fox, and NBC et al. Br. in Opp. 26-27. It is well-established, however, that this Court "avoid[s] the unnecessary decision of [constitutional] issues." *Pacifica*, 438 U.S. at 734. *See also Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Mindful of this principle, there is no occasion in this case for the Court to reconsider its holdings in *Pacifica* or *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), or to hold that government restrictions on broadcaster speech are subject to strict scrutiny. The FCC's new indecency policy fails to survive First Amendment review even under an intermediate scrutiny standard. Accordingly, questions regarding spectrum scarcity, the pervasiveness of broadcast television, and the accessibility of the Internet can and should be left for another day.[13]

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[13] *Pacifica* relied on broadcasting's characteristics, not on spectrum scarcity. *See Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., joined by Marshall, J., dissenting) (majority and concurring opinions "rightly refrain from relying on the notion of 'spectrum scarcity' to support their result"). As *amici* communications law scholars note, "[c]asting doubt on the scarcity rationale" in this case "would inject uncertainty into a wide variety of actions that the government [has] adopted in reliance on that rationale." Br. of Yale Information Society Project et al. at 4.

A. The new indecency policy goes well beyond the constitutional limits suggested by *Pacifica*.

1. In *Pacifica* this Court held that the FCC could sanction a midday radio broadcast of George Carlin's "Filthy Words" monologue. *Pacifica*, 438 U.S. at 732. Carlin's monologue, aired "as part of a program on contemporary attitudes toward the use of language," "deliberately repeated" the seven words in question "over and over again" "in a variety of colloquialisms," to discuss their capacity for shock, as well as their dexterousness of meaning based on the context in which they can be used. *Fox*, 129 S. Ct. at 1828 (Ginsburg, J., dissenting). To that end, the Carlin broadcast repeated the word "fuck" 30 times, the word "shit" or a derivative 70 times, and the word "motherfucker" twice. *See Pacifica*, 438 U.S. at 751-755 (Appendix).

In holding that the FCC could sanction the Carlin broadcast pursuant to its authority under the indecency statute, the Court "emphasized the narrowness of its holding." *Id.* at 750; *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126-27 (1989) (*Pacifica* is "emphatically narrow"). This "narrowness," articulated in Justice Powell's concurring opinion, expressly distinguished the "verbal shock treatment administered" by the "Filthy Words" broadcast from fleeting use of expletives, stating that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring).

2. The Government recognizes that by finding a single fleeting expletive presumptively indecent, the FCC's new indecency policy goes well beyond the FCC enforcement action upheld in *Pacifica*. Pet. Br. 37. It attempts to explain away the difference between a hundred uses of the words "fuck" and "shit" and a single use of those words by pointing to language in this Court's *Fox* opinion that, in the Court's words, went "to [its] holding on administrative law, and says nothing about constitutionality." *See Fox*, 129 S. Ct. at 1818 n.7; *see also id.* at 1815 (characterizing broadcasters' *Pacifica*-based arguments as "an administrative-law shield"). This language in *Fox* does not alter *Pacifica*'s express limitation of its *constitutional* holding to the "particular broadcast" before it, which made clear that it did not apply to isolated uses of "potentially offensive word[s]." *Pacifica*, 438 U.S. at 735, 742; *see also id.* at 760-61 (Powell, J., concurring).[14]

The same is true of purportedly indecent images. The Commission found for decades that its ability to punish broadcasting nude images, like its ability to punish broadcasting expletives, was constitutionally circumscribed by "the narrowness of the *Pacifica* holding." *WGBH Educ. Found.*, 69 F.C.C.2d. at 1254, ¶ 10; *see also WPBN/WTOM*, 15 F.C.C.R. at 1841,

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[14] Justice Stevens, *Pacifica*'s author and the sole remaining member of the *Pacifica* Court when *Fox* was decided, stated that "the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time." *FCC v. Fox*, 129 S. Ct. at 1825 (Stevens, J., dissenting).

n.5 (assessing indecency of nude images involves "an analysis of whether the allegedly indecent material is isolated or fleeting"). But in the "NYPD Blue" proceeding, the FCC expanded its interpretation of its own authority to punish less than seven seconds of nonsexualized nudity during an hour-long adult drama aired in the late evening—even questioning *Pacifica*'s relevance to its indecency determination. *See* Pet. App. 45a. The FCC's interpretation "venture[s] far beyond *Pacifica*'s reading of § 1464." *Fox*, 129 S. Ct. at 1828 (Stevens, J., dissenting).

In sum, *Pacifica* indicates that the First Amendment imposes significant limitations on the government's authority to punish non-obscene broadcaster speech, including "isolated" expletives and brief nudity that does not constitute "shock treatment." The FCC's new indecency enforcement policy exceeds these constitutional limitations.

B. The New Indecency Policy Cannot Survive Intermediate Scrutiny.

Although *Pacifica* did not specify the level of scrutiny applicable to broadcasters' speech under the First Amendment, this Court has explained that government restrictions on such speech "have been upheld only when [the Court was] satisfied that the restriction is narrowly tailored to further a substantial governmental interest . . . ." *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). The new indecency policy cannot survive First Amendment scrutiny under this standard.

1. The policy does not further a substantial government interest.

1. Under intermediate scrutiny, "the party seeking to uphold a restriction" on speech "carries the burden of justifying it." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). To meet its burden, the government need not demonstrate a "direct causal link" between the interest asserted and the action taken. *Brown v. Ent. Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2010) ("*EMA*"). However,

> [w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (plurality opinion) (citation and quotation marks omitted).

Here, the Government claims that the new indecency policy "implements Congress's determination that indecent material is harmful to children" and "furthers the government's long-recognized interest in protecting minors from exposure to vulgar and offensive spoken language." Pet. Br. 41 (citations and quotation marks omitted). *Pacifica* and subsequent cases affirm that the Government has a "compelling interest in protecting the psychological well-being of minors" by shielding

them from indecent material "that is not obscene by adult standards." *See, e.g.*, *Sable*, 492 U.S. at 126-27. But that articulation of the government's interest is insufficiently precise for assessing whether *this* indecency enforcement regime can survive intermediate scrutiny. The interest the Government asserts in support of the FCC's new policy is to prevent children from being exposed to *fleeting* expletives and *fleeting* nudity—material the FCC has never before found indecent.

2. Once the Government's interest is properly defined, it becomes clear that the Government has not shown that its interest is substantial.

a. To support its interest in shielding children from fleeting expletives, the Government again points to language from this Court's administrative law analysis in *Fox*, which reasoned that granting broadcasters immunity for fleeting expletives would permit them to "air expletives at all hours of the day so long as they did so one at a time," and that the FCC could prevent children from viewing such hypothetically expletive-peppered programming because children tend to repeat what they hear. Pet. Br. 37 (quoting *Fox*, 129 S. Ct. at 1813). But as the court below found, "broadcasters have never barraged the airwaves with expletives even prior to" the broadcasts at issue in this case, which were aired during an enforcement regime when fleeting expletives were not actionable. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 460 (2d Cir. 2007), *rev'd and remanded*, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). The FCC agrees with the court of appeals on this point. *See* Pet. App. 60a-61a.

In light of the FCC's admission that the airwaves would not be filled with fleeting expletives without an expanded indecency enforcement policy, the Government cannot demonstrate that it has a substantial interest in expanding the policy to proscribe fleeting expletives. The government may "bar public dissemination of protected materials" to children "only in relatively narrow and well-defined circumstances." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). The government has not shown that those circumstances are present here.

b. To justify the FCC's actions in the "NYPD Blue" proceeding, the Government attempts to rely on "the interests *of parents* in controlling the circumstances under which their children view [brief nude] images." Pet. Br. 39 (emphasis added). It is doubtful whether this even qualifies as a proper governmental interest. *See EMA*, 131 S. Ct. at 2740 ("[W]e note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority.") (emphasis in original). And even if the Government's stated interest could be interpreted as assisting parents to protect their children from viewing brief nonsexualized nudity on television, this interest is not substantial, since parents are already well-equipped for the task with parental guidelines, channel blocking technologies, and pre-program advisories such as the one that preceded the "NYPD Blue" broadcast. *See* Part II.B.2. *infra*.

3. The fact that a regulation is underinclusive cuts against the substantiality of the government's claimed justification for it. *Metromedia, Inc. v. City*

of San Diego, 453 U.S. 490, 511 (1981) (applying intermediate scrutiny). "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *EMA*, 131 S. Ct. at 2740.

Here, despite its asserted interest in shielding children from fleeting expletives and brief nude images, under the new policy FCC has permitted: (1) multiple uses of the words "fuck" and "shit" during "Saving Private Ryan," *"Saving Private Ryan" Order*, 20 F.C.C.R. at 4513, ¶ 15; (2) use of the term "bullshitter" during a live interview on a morning television program, on the ground it aired during a bona fide news interview, Pet. App. 67a-73a; (3) a clearly visible image of graffiti showing the words "FUCK COPS," *Omnibus Order*, 21 F.C.C.R. at 2709, ¶¶ 188-191; (4) multiple uses of the word "ass," as well as a number of its derivatives, *id.*, at 2710, 2712, ¶¶ 193, 197; and (5) the image of a man's penis, *id.*, at 2716-17, ¶¶ 214-218.

As a result, the FCC's new enforcement policy is substantially underinclusive. The Government asserts a significant interest in protecting children from the very content that it regularly lets television stations air without penalty.

2. The policy is not narrowly tailored.

Narrow tailoring in the intermediate scrutiny context requires that "the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." *Turner Broad. Co.*, 512 U.S. at 662 (quoting *Ward v.*

Rock Against Racism, 491 U.S. 781, 799 (1989)); *cf. Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) ("[I]t seems unlikely that a statute is narrowly tailored . . . when it potentially criminalizes distribution of works featuring only brief flashes of nudity.") (citing *Erznoznik*, 422 U.S. at 214 n.10).

In addition, when the government resorts to content-based regulation, it must prove that a "plausible, less restrictive alternative . . . will be ineffective to achieve its goals." *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). "[I]f a less restrictive means is available for the Government to achieve its goals, [it] must use it." *Id.* at 815. Content-neutral "targeted blocking" is always a less restrictive alternative to content-based speech proscriptions, because it "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.*; *see also Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 756 (1996) (where technology provides "other means to protect children from . . . 'patently offensive' material," direct, content-based limitations on speech are not the least restrictive means).

Several less restrictive means exist to address the Government's asserted interest. Every television set manufactured since January 2000 that is larger than 13 inches must include a "feature designed to enable viewers to block display of all programs with a common rating . . . ." 47 USC § 303(x). This congressional mandate has taken the form of the V-Chip, a "device that empowers viewers to block

broadcasts based on their age rating or content descriptors." ABC et al. Br. in Opp. 5. A blocking device restricts less speech than massive fines and potential criminal liability for airing fleeting or brief content. *See Playboy Entm't Grp.*, 529 U.S. at 815 (content-neutral, viewer-requested channel blocking regime less restrictive than content-based, statutorily imposed ban on showing constitutionally protected "sexually oriented programming" during certain hours of day). "Simply put, targeted blocking is less restrictive than banning." *Id.*

Furthermore, nearly 90 percent of all television viewers receive broadcast programing via cable or satellite. "As a practical matter, cable and satellite-provided controls are the primary blocking tools used in most households." *FCC Child Safe Viewing Act Report*, 24 F.C.C.R. 11,413, 11,438, ¶ 56 (2009). In addition, cable providers are "required by statute to fully block the audio and video programming" of a channel upon subscriber request. *See* Pet. App. 170a (citing 47 U.S.C. § 560). These content-neutral, congressionally-imposed technologies are far less restrictive means of supporting parents' efforts to shield their children from content they decide is inappropriate for younger eyes or ears.

* * *

This Court in *Pacifica* did not grant the Commission "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Pacifica*, 438 U.S. at 759-60 (Powell, J., concurring). The FCC, heeding that guidance and

constrained by the First Amendment, maintained for decades that isolated material that is not the equivalent of "shock treatment" is not actionable. *WGBH Educ. Found.*, 69 F.C.C.2d at 1254, ¶ 10. The Commission's new indecency enforcement regime transforms what the Commission long considered an "insurmountable obstacle" into "an open door." *Fox*, 129 S. Ct. at 1834 (Breyer, J., dissenting). The Court should affirm that the FCC's prior interpretation is correct, and that its new interpretation exceeds the limits of the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT A. LONG, JR.
Counsel of Record
JONATHAN D. BLAKE
JENNIFER A. JOHNSON
ENRIQUE ARMIJO
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, N.W.
Washington, DC 20004
rlong@cov.com
(202) 662-6000

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RESPONDENT'S BRIEF

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IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS CENTER FOR CREATIVE VOICES IN MEDIA AND THE FUTURE OF MUSIC COALITION

*Andrew Jay Schwartzman
Chrystiane B. Pereira
Media Access Project
1625 K Street, NW
Suite 1000
Washington, DC 20006
(202) 232-4300
andys@mediaaccess.org

November 3, 2011

* Counsel of Record

Library of Congress

QUESTION PRESENTED

Whether the court of appeals properly determined that the Federal Communications Commission's (FCC) context-based indecency policy is unconstitutionally vague and accordingly unenforceable.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Center for Creative Voices in Media and Future of Music Coalition (jointly "Center") respectfully submit this corporate disclosure statement. The Center of Creative Voices in Media does not have a parent company and no publicly held company owns 10 percent or more of stock therein. The Future of Music Coalition does not have a parent company and no publicly held company owns 10 percent or more of stock therein.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. **Nothing in *Pacifica* Authorizes the FCC's New Indecency Policy** 9

A. ***Pacifica* Was A Narrow Ruling Proceeding From the Expectation That The Commission Would Tread Cautiously** 10

B. **The FCC's Impermissibly Vague New Policy Has Had A Chilling Effect** 14

II. ***Red Lion* is Inapposite and Irrelevant** 22

A. **This Court and The FCC Have Acknowledged *Red Lion* Has No Bearing On Indecency Regulation** 24

B. **The Government Interests Furthered In Indecency Cases Differ From Those In *Red Lion* Cases** 25

C. **Revisiting *Red Lion* Would Create A Host Of Problems And Solve None** 28

CONCLUSION 38

TABLE OF AUTHORITIES

Page

Cases

Action for Children's Television v. FCC, 853 F.2d 1332 (D.C. Cir. 1988) 13, 25
Action for Children's Television v. FCC, 58 F. 3d 654 (D.C. Cir. 1995)..... 6, 28, 29
Associated Press v. United States, 326 U.S. 1 (1945)..... 27
Branton v. FCC, 993 F.2d 906 (D.C. Cir. 1993)..... 14
Broadrick v. Oaklahoma, 413 U.S. 601 (1973) 18
CBS, Inc. v. FCC, 453 U.S. 367 (1981) 27, 32
Century Federal, Inc. v. City of Palo Alto, 710 F.Supp. 1552 (N.D. Cal. 1987).. 31
Chesapeake & Potomac Telephone Co. v. FCC, 42 F. 3d 181 (4d Cir. 1994) 34
City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) 15
Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)..... 33
Comcast Corp. v. FCC, 579 F. 3d 1 (D.C. Cir. 2009) 34
Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727 (1996) 6, 28
FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1958)..... 31
FCC v. Fox Television Stations, Inc., 556 U.S. 502, 129 S. Ct. 1800 (2009)..... 3, 15, 23

TABLE OF AUTHORITIES-Continued

Page

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TABLE OF AUTHORITIES-Continued

Page

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Statute

120 Stat. 491 20
124 Stat. 2751 32
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47 USC §335 ..... 30, 32
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TABLE OF AUTHORITIES-Continued

Page

Administrative Orders

11 FCCRcd 10660 32
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Complaints Regarding Various Television Broadcasts Between Feb 2, 2002 and Mar. 8, 2005, 21 FCCRcd 2664 (2006) 2, 16, 20
Infinity Broadcasting Corp. of Pa., 3 FCCRcd 930 (1987) 25
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In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Award" Program, 19 FCCRcd 4975 (2004) 16
In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCCRcd 13299 (2006) 15
In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 FCCRcd 4507 (2005) 15, 18
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Peter Branton, 6 FCCRcd 610 (1991) 14

TABLE OF AUTHORITIES-Continued

Page

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TABLE OF AUTHORITIES-Continued

Page

Comments of Center for Creative Voices in Media, In the Matter of Prometheus Radio Project v. FCC, at http://www.creativevoices.us/cgi-upload/news/news_article/LocalismCommentsApril2008.pdf 2
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"Comm. Daily Notebook," COMM. DAILY, Oct. 12, 2011 37
Declaration of Nicole A. Bernard (Sept. 21, 2006) 21
FCC News, Broadcast Station Totals as of Mar. 31, 2011 *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306575A1.pdf 3
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Page

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TABLE OF AUTHORITIES-Continued

Page

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STATEMENT

Respondent Center for Creative Voices in Media ("CCV") is an organization dedicated to protecting and promoting the interests of its constituents, who create and provide artistic content to broadcast programs. CCV's Board of Advisors includes writers, producers, actors, authors, and other creative professionals. CCV seeks to safeguard and enrich the vitality and diversity of our nation's democracy and culture, by educating legislators, regulators, the press, and the public on the significant social benefits the American people will realize when our nation's media environment nurtures and supports independent, original, diverse, and creative voices.

Future of Music Coalition ("FMC") is a national nonprofit organization that works to nurture a diverse musical culture where artists flourish, are compensated fairly for their work, and where fans can find the music they want. Founded in June 2000 by musicians, artist advocates, technologists and legal experts, FMC works to ensure that musicians have a voice in the issues that affect their livelihood. FMC's work is rooted in the real-world experiences and ambitions of working musicians, whose perspectives are often overlooked in policy debates. Guided by a firm conviction that public policy has real impact on the lives of both musicians and fans, FMC advocates for a balanced approach to music in the digital age — one that reflects the interests of all stakeholders, and not just the powerful few. FMC has been a strong proponent of development of community-based, low-power FM radio stations that support local and regional music tastes often ignored by large, group-owned stations. It has been an active

participant in FCC proceedings concerning limits on broadcast ownership, taking the position that concentration of media ownership has restricted program format diversity. Like CCV, FMC has filed comments supporting limits on broadcast ownership as a means of promoting diversity[1] and participated in the FCC's "localism" docket.[2]

Creators such as those represented by CCV and FMC are at the forefront of creating and delivering speech. These writers, directors and musicians work under the pressure of deadlines, financial constraints and stiff indecency penalties hinging upon their prognostics as to the likelihood their particular use of a particular phrase is so "demonstrably essential to the nature of an artistic work" as to constitute the "rare case" in which "profan[ity] will not be found to be profane."[3] The inhibiting environment thus

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[1] FMC has submitted several detailed analyses to the FCC showing a relationship between group ownership and the loss of diversity in radio music formats. *See, e.g.*, Future of Music Coalition, "Do Radio Companies Offer More Variety When They Exceed the Local Ownership Cap?" http://futureofmusic.org/filing/fmc-comments-filed-fcc-broadcast-ownership-proceeding.

See Prometheus Radio Project v. FCC, 373 F.3d 372, 432 (3d Cir. 2004) (citing FMC comments).

[2] These comments may be viewed at

http://futureofmusic.org/files/FMClocalismreplycomments08.pdf (FMC comments); and

http://www.creativevoices.us/cgi-upload/news/news_article/LocalismCommentsApril2008.pdf (CCV comments).

[3] *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCCRcd 2664, 2670, ¶19 (2006) ("*Omnibus Order*") (JA 52).

created directly interferes with the process of artistic and creative expression which lies at the heart of what the First Amendment was designed to protect. This chilling effect is most pronounced upon non-commercial and other small stations, especially the low-power FM stations FMC has fought to create.[4]

Generally, Petitioners' brief misleadingly presumes the Commission's policy only affects large, network-owned, television stations, simply because it has affected ABC and Fox. That presumption is incorrect.[5] Contrary to Petitioners' suggestion, not all licensees are "highly sophisticated entities" with "personnel and internal rules dedicated to compliance with" the FCC's indecency standard.[6] Thousands of radio and TV stations lack those entities' history in dealing with the Commission, through which sophistication with its methods may be borne, and have nowhere near equivalent resources or staff.

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[4] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S.Ct 1800, 1835-38 (2009) (Breyer, J., dissenting) (addressing "likelihood that smaller independent broadcasters, including many public service broadcasters,...would reduce local coverage, indeed cancel coverage, of many public events....").

[5] ABC owns 10 television stations, per its disclosure at http://corporate.disney.go.com/corporate/overview.html. Fox owns 27 television stations. *See* http://www.newscorp.com/operations/tvstations.html. They represent a small subset of the 30,643 total broadcast stations per the FCC's count as of March 31, 2011. FCC News, Broadcast Station Totals as of Mar. 31, 2011 (rel. May 6, 2011), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC306575A1.pdf. Per the same release, there were 1,774 full-power TV stations, 2,172 low-power TV stations and 14,729 full-power radio stations on the air, plus 859 low-power FM stations.

[6] *See* Pet'r's Br. at 19-20.

Indeed, most community-based, low-power radio stations operate entirely with volunteers.[7] FMC also works to promote niche formats and regional music formats on smaller radio stations throughout the US, where new and cutting edge music that never has been vetted by a large record label's legal team is likely to appear.

Alongside these radio stations there are hundreds of full-power and more than 2,000 low-power television stations. While a not insignificant portion of smaller stations are operated by large group owners with resources and staff – which is not to concede that the Commission's indecency standards are sufficiently precise – a vast number have tiny staffs, no lawyers and limited resources. Those stations have no possible way to address a policy, enforcement of which leaves mystifying clouds of words behind for prognostication.

The vague and confusing nature of the FCC's actions has resulted in uncertainty as to what constitutes "indecent" programming. Petitioners go so far as to argue that those left uncertain simply should choose to remain indefinitely confused by stuffing any and all potentially implicated programming between the hours of 10 p.m. and 6 a.m. when a regulatory safe harbor would leave any questions up

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[7] *See* Comments of Prometheus Radio Project, Future of Music Coalition, United Church of Christ, Office of Communication, Inc., In the Matter of Creation of a Low-Power Radio Service, Docket No. 99-25, Sept. 6, 2011, at 4-5 (noting difficulties of grassroots groups in even navigating the LPFM application process, using volunteers and, on occasion, volunteering attorneys). *Available* at http://fjallfoss.fcc.gov/ecfs/document/view?id=7021707649.

in the air.[8] But this is not a working model for creators competing for a limited audience and increasingly limited financial support. It is even less appropriate in the context of radio, where several hundred songs may be broadcast in a single day.

The Commission's action in this and other cases has affected the output of creators in a manner that the Court did not intend or sanction in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). For example, licenlicensees have mandated that creators edit their programming simply as a precautionary measure—the inevitable tendency to err on the side of caution means that the impact of the Commission's action is often broader than its plain language would suggest. In other cases, licensees have flatly refused to air certain programming for fear of being subject to complaints of indecency.[9]

Without coherent and consistent guidelines as to what constitutes indecent programming, creators are literally at a loss for words. Each keystroke comes under pressure of speculation as to how far creativity and expression can reach before prompting a complaint. The Commission's decisions, therefore, have resulted in a palpable chill on free speech.

The Commission's indecency enforcement also limits the source material for artists. Most artists

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[8] *See* Pet'r's Br. at 20.

[9] *See* Brief for *Amici Curiae* Public Broadcasters in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 2008, at 12-16 (listing and discussing several such examples), 25 ("FCC's current policy has had a profound chilling effect on [*amici's*] programming by preventing them from airing unedited versions of many programs for fear of massive liability.").

consume television and radio with a heightened interest in observing and building upon the work of other creators in their industry. Thus, a critical aspect of the creative process is to have access to diverse programming, which enables and fosters further creative expression. None of this is to say that recreational television and radio viewing, of which creators also partake, warrants less protection. Creators and their public, as individual viewers and listeners, are entitled to expect a diversity of creative expression. The current indecency regime also fails by preventing viewers and listeners from receiving access to protected speech and expression.

SUMMARY OF ARGUMENT

I. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), provides the rationale for the Commission's indecency regulations. *Pacifica* directly addressed the constitutionality of indecency regulations without reliance on *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 376 (1969) or its associated "scarcity rationale," *id.* at 390. Consistent with that Court's explicit rejection of the FCC's attempt to offer the *Red Lion* scarcity rationale as any basis for indecency regulations, the line of precedent associated with *Pacifica* is about censorship and suppression of indecency.[10] This is in stark contrast to *Red Lion*, which is designed to promote more speech, and its progeny.[11]

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[10] *See, e.g., Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality); *Action for Children's Television*, 58 F.3d 654, 660 (D.C. Cir. 1995) (*en banc*).

[11] *See* Brief in Opposition of Intervenors Center for Creative Voices in Media and The Future of Music Coalition, On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 3-4

The *Pacifica* court properly rejected the FCC's attempt to offer *Red Lion* as any basis for indecency regulations, and the precedent for broadcast indecency remains *Pacifica*, and not *Red Lion*. Because this case presents the narrow question of the constitutionality of broadcast indecency regulations designed for censorship and suppression, *Pacifica*, and not *Red Lion*, is apposite.

II. The FCC's "indecency" findings at issue in this case relied on application of an unconstitutionally vague, context-based policy. The Commission's current indecency policy cannot be reconciled with *Pacifica*. Nothing in *Pacifica* authorizes the FCC's new, hard line on indecent speech, and its holding most certainly did not approve restrictions on fleeting and isolated images or words. Justices Powell and Blackmun, who cast the decisive votes in *Pacifica*, stated an understanding that no chilling effect would be had upon broadcasters from its sanction of repeated use of expletives because the FCC would "proceed cautiously, as it ha[d] in the past."[12] The FCC today, as exemplified by the applications at issue in this case, is not proceeding cautiously as it runs roughshod over free expression protections and chills speech.

III. The Court should avoid entertaining other parties' invitations to evaluate *Red Lion* or its rationale in the context of this unrelated proceeding. The *Red Lion* rationale is irrelevant to this case, as it was

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(discussing *Red Lion* line of cases). *See also* Brief of *Amici Curiae* Yale Law School Information Society, et al., 10-1293, at 8-9, 15-16, 17-23, 27-29 ("Yale Br.") (more fully analyzing same line and its associated impact).

[12] *Pacifica*, 438 U.S. at 761 n.4.

to *Pacifica*. The *Red Lion* line of cases relate to a broader discourse-*promoting* body aimed, for example, at structuring the media so as to ensure the widest dissemination by diverse sources (*e.g.* spectrum policy rules, ownership limits, universal service mandates). The principles of *Red Lion* repeatedly have been reaffirmed by this Court and lower courts. Thus questioning *Red Lion*, even in *dicta*, in the context of a proceeding that does not rely upon the scarcity rationale, could render unconstitutional the many discourse-promoting statutes and regulations it has served to support, throwing media, Internet and spectrum policy into chaos.

ARGUMENT

The Court of Appeals properly invalidated the "indecency" findings at issue, which relied on application of an unconstitutionally vague, context-based policy. Respondents respectfully request that this Court maintain the distinction between the *Red Lion* and *Pacifica* line of cases by holding that the FCC's actions are unconstitutional under *Pacifica*. Neither the Court of Appeals nor the FCC revisited or relied upon *Red Lion*, respectively, in reaching their differing decisions. Nevertheless, for the first time in this litigation, the government, as if to recognize that *Pacifica* provides no coverage for the stupefying chill that the current FCC indecency regime inflicts upon protected expression, attempts to frame this case around fundamental questions about the sources of authority for broadcast regulation. In so doing, it seeks support for the Commission's actions from the unrelated, inapposite *Red Lion* decision.[13]

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[13] *See* Pet'r's Br. at 42-44 (describing scarcity, *inter alia*, as rationale for limited First Amendment scrutiny of a require-

No manner of argument can change the fact that *Red Lion* and its underlying rationales are irrelevant to this case. While the Court may wish to review the factual premises underlying *Pacifica*, despite the fact that it need not do so to properly decide this case, such reconsideration could only have a minimal impact, limited to broadcast outlets. By contrast, questioning *Red Lion* could undermine current and forward-looking laws, and cast doubt on every spectrum license. Arguably, this is precisely what ABC seeks to do when diverting the Court's attention to its opinion that *Red Lion* would be "untenable today" and broadly arguing that the Court subject all "content-based restrictions on broadcasters' expression" to strict scrutiny.[14] Yet all *Red Lion* can be here is a red herring. When, if ever, a proceeding before this Court actually relies upon the scarcity rationale, then those interested parties properly will have the opportunity to brief its factual underpinnings and relevance. Until then, the Court should not entertain the invitation of any party to this unrelated case to address *Red Lion*.

I. NOTHING IN *PACIFICA* AUTHORIZES THE FCC'S NEW INDECENCY POLICY.

The FCC's indecency policy as articulated in the orders under review is unconstitutionally vague in violation of the First Amendment and the due

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ment that licensees "accept content-based restrictions that could not be imposed on other communications media.").

[14] Brief in Opp'n of ABC, Inc. et al., On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 30, 32. *See also* Yale Br., at 9-10.

process clause of the Fifth Amendment and cannot be sustained by reliance on *Pacifica*.

A. *PACIFICA* WAS A NARROW RULING PROCEEDING FROM THE EXPECTATION THAT THE COMMISSION WOULD TREAD CAUTIOUSLY.

Pacifica directly addressed the constitutionality of indecency regulations without reliance on *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 376 (1969), or its associated "scarcity rationale," *id.* at 390.

In *Pacifica* the Supreme Court ruled only that the particular program "as broadcast" was indecent.[15] Justices Powell and Blackmun, two of the five members of the Court's majority, rejected the broadcaster's overbreadth challenge to the FCC's indecency definition based on the understanding that "the Commission may be expected to proceed cautiously as it has in the past."[16] Significantly, the Powell concurrence made plain that *Pacifica* did not proscribe regulation against "isolated use of a potentially offensive word," *id.* at 760-61.

One of the factors leading to the Court's narrow affirmance of the FCC appears to have been the opinion of Judge Leventhal in the decision below. Leventhal, a highly respected jurist who dissented and opined that the only issue before him was the

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[15] 438 U.S. at 734. *See also id.* at 742 ("Our review is limited to the question of whether the Commission has the authority to proscribe this particular broadcast....").

[16] *Id.* at 761-62 n.4 (Powell, J., joined by Blackmun, J., concurring) (contemplating further that the policy would not create "an undue 'chilling' effect on broadcasters' exercise of their rights.").

narrow question of the reasonableness of the FCC's treatment of an afternoon broadcast of the Carlin monologue, was repeatedly referenced by Justices Blackmun and Powell in conference.[17] Justice Blackmun noted that "the FCC's order was not a very good one, and [Judge] Leventhal tried to save it. I came out with him."[18] The Conference Notes also report that Justice Stevens, who authored the majority opinion, opined the Court "should also accept the FCC representation that Leventhal correctly read its order."[19]

Consistent with the Court's intent, many at the time understood the decision to narrowly justify a restrained form of broadcast indecency regulation. For example, when supporting the decision in an editorial, the *Washington Post* noted that neither Justice Stevens nor Justice Powell suggested "that the FCC should require that the occasional dirty word be bleeped out or that programming should always be aimed only at family audiences."[20] Throwing more weight behind this public perception,

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[17] Angela Campbell, *Pacifica Reconsidered: Implications for the Current Controversy Over Broadcast Indecency*, 63 FED. COMM. L.J. 195, 256-57 (2010).

[18] *The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions* 373 (Del Dickson ed., 2001). *See also* Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. at 230, n. 248 (discussing same). Campbell adds that Justice Powell voiced his agreement with Leventhal's decision to "construe what the decision is as narrowly as possible." *Id.* n. 249.

[19] *Id.*

[20] *See* Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. at 243 n.339 (citing Editorial, "Seven Naughty Words," WASH. POST, Jul. 7, 1978, at A18.).

Commissioner Abbott Washburn, who had been on the FCC when it issued the Pacifica Declaratory Order, assured his audience in a subsequent speech to the Federal Communications Bar Association that the Commission would not go "on a regulatory spree as a consequence."[21]

In manner underscoring its disinclination to distort *Pacifica*, the FCC sought to immediately allay public concerns with clear indication that it would tread very carefully in its regulation of indecent speech to avoid violating the First Amendment. According to the chief of staff to then-FCC Chairman Charles D. Ferris, Frank Lloyd, Ferris instructed him to "find the first possible indecency complaint that comes in and make it clear that that case will never reoccur at the FCC."[22] The Commission picked a case against a Boston public TV station, which rendition of Molly Bloom's soliloquy in *Ulysses* had all the seven dirty words in it. In a unanimous decision in that station's favor, the Commission stated its intention to "construe the *Pacifica* holding consistent with the paramount importance we attach to encouraging free-ranging programming and editorial discretion by broadcasters."[23]

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[21] Abbott Washburn, FCC Commissioner, "Luncheon Address Before the Federal Communications Bar Association, Washington, D.C.: Indecency and the Law in Broadcasting," Mar. 7, 1979. *See also* Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. n.68 (noting that Washburn sent a copy of the speech to Justice Blackmun, who filed it in the *Pacifica* case files.).

[22] Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. at 243-44, n.341.

[23] *WGHB Educational Foundation, Memorandum Opinion and Order*, 69 FCC2d 1250, ¶10-11 (1978).

In a subsequent speech, Chairman Ferris predicted that "[t]he particular set of circumstances in the Pacifica case is about as likely to occur again as Halley's Comet"[24]; and for the next 10 years, the FCC made it look as if this would be the case.[25] Observing the FCC's deference to reasonable licensee judgments, the D.C. Circuit rejected an overbreadth challenge to the Commission's definition of indecency. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) (hereinafter "*ACT*"). Then-Judge Ruth Bader Ginsburg authored the court's opinion, reasoning that "the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy." *Id.* Like the Supreme Court in *Pacifica*, the D.C. Circuit in *ACT* did not contemplate, much less sanction, a new FCC regime based on the Commission's own highly subjective judgment of "contextual" factors.

The Commission's noteworthy restraint remained evident in its subsequent dismissal of a complaint regarding broadcast of NPR's *All Things Considered*

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[24] Campbell, *Pacifica Reconsidered*, 63 FED. COMM. L.J. at 244 n.347. As if to explain why *Pacifica* would be rare, Chairman Ferris also noted that the FCC was "far more dedicated to the First Amendment premise that broadcasters should air controversial programming than [] worried about an occasional four-letter word." Charles Ferris, Chairman, FCC, Address Before the New England Broad. Assn'n, at 8 (Jul. 21, 1978).

[25] *See* Lilli Levi, *The FCC's Regulation of Indecency*, 7 FIRST REPORTS 1, 2, 13 (2008) (commenting on the FCC's avowed restraint and early reassurances to broadcasters) (cited in Campbell, 63 FED. COMM. L.J. n. 363). *See also Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 448-51 (2d Cir. 2007) (describing the evolution of the Commission's indecency regime).

program including a wiretapped telephone call where gangster John Gotti uttered 10 variations of the word "fuck" in rapid succession. *Peter Branton*, 6 FCCRcd 610 (1991), *rev. dismissed sub nom. Branton v. FCC*, 993 F.2d 906 (D.C. Cir. 1993). With *Branton*, the Commission took the opportunity to reaffirm its "traditional" "reluctan[ce] to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming," *id.*, signaling that the Courts could continue to rule deferentially.

B. THE FCC'S IMPERMISSIBLY VAGUE NEW POLICY HAS HAD A CHILLING EFFECT.

Today, the *Branton* decision is a relic of a bygone era. As the present case makes plain, restraint and editorial deference no longer characterize the Commission's indecency enforcement, which is rather akin to a "regulatory spree." The FCC has replaced a policy of reluctance to curb or chill the expression of broadcast licensees and creators with a standardless and largely meaningless framework, which cannot be reconciled with *Pacifica*, or with the First Amendment.[26]

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[26] *See, e.g., Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (construing the term "patently offensive," noting that vagueness of content-based regulation raises "special First Amendment concerns because of its obvious chilling effect on free speech."). *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (striking down ordinance imposing public speaking fee determined by government official; holding licensing schemes that provide regulator with power to suppress speech without meaningful standards limiting its discretion are unconstitutional).

The Commission has sought to regulate broadcast indecency, which is permissible under *Pacifica*. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1812 (2009). But its policy shift impermissibly has cast a nebulous "context" cloud in the determination of whether given content violates the FCC's indecency regulations. Nowhere in *Pacifica* did the Court suggest the Commission could distinguish among programming based on the merits of the surrounding content or the identity of the speaker. Elsewhere, the Court has held that the First Amendment cannot countenance standards as flimsy as these, which allow "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria," "making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988).

Ignoring legal precedent and its own earlier decisions, the Commission now opts to leave broadcasters and artists to decipher what will be "indecent" with no guidance at all. Sampling from the FCC's approach, creators may glean that *expletives* may *not* be indecent when uttered by (1) actors depicting soldiers in the heat of battle[27] or (2) entertainers on programs that feature news content,[28] yet

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[27] *In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCCRcd 4507, ¶4 (2005) ("*Saving Private Ryan Order*").

[28] *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCCRcd 13,299, ¶¶ 9, 70-73 (2006) ("*Remand Order*") (reversing course to "defer to

likely *are* impermissibly "indecent" when uttered by (1) actors in the heat of life-and-death police activities,[29] (2) entertainers at live awards show programs,[30] or (3) actual blues producers and hip-hop artists in a documentary.[31] The last guidepost, given in response to Martin Scorsese's documentary "The Blues: Godfathers and Sons," regarding blues music in Chicago, is particularly remarkable because the Commission concluded the language was indecent partly because "many of the expletives in the broadcast are not used by blues performers," but instead by hip-hop performers and a leading record producer.[32] Though the "licensee may have been under the good faith belief that the use of [] expletives served a legitimate informational purpose," and "may have had some communicative purpose," the Commission allowed, nevertheless it failed to "demonstrate that [the use of expletives] was essential to the nature of

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CBS's plausible characterization of its own programming" in fleeting expletive use during interview with reality show contestant airing during "The Early Show" program).

[29] *Omnibus Order* ¶¶130, 134 (JA 117-119).

[30] *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Award" Program*, 19 FCCRcd 4975, ¶¶8, 12 (2004) ("*Golden Globes Awards Order*").

[31] *Omnibus Order* ¶¶72-86 (JA 84-94). In this portion of the *Omnibus Order* not later vacated, the Commission held that San Mateo County Community College District broadcast of Martin Scorsese's documentary "The Blues: Godfathers and Sons," which concerned the growth of blues music in Chicago, on a noncommercial station was actionably indecent, and issued Notice of Apparent Liability for Forfeiture.

[32] *Id.* at ¶77 (JA 88). *See also* Brief for *Amici Curiae* Public Broadcasters in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 2008, at 10-11 (discussing same).

an artistic or educational work or essential to informing viewers on a matter of public importance."[33] If the FCC's decision regarding "The Blues" is guide to anything, it is to deciding the unconstitutionality of the policy it reflects, which hinges on "esthetic and moral judgments about art and literature" that "are for the individual to make, not for the Government to decree." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000).

For individual artists and broadcasters seeking to make judgments about content, the Commission's decisions not only fail to guide but constitute a blindfold, and a muzzle.

As this Court earlier cautioned, uncertainty prompts citizens to "steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly marked."[34] The FCC's expansion of its policy far past what *Pacifica* contemplated violates the First Amendment by chilling creators and broadcasters, and shielding the public, from authentic program offerings. The Commission's extremist approach threatens to damage the quality of programming and prevent realistic portraits of many persons, subjects and situations. By abandoning restraint and crossing the line into arbitrary and unconstitutional agency action, the Commission profoundly impacts artists seeking to express themselves as creatively as possible. Already, the Commission's shift in indecency policy has prohibited

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[33] *Id.* at ¶82 (JA 90-91).

[34] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (also noting that "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit exercise of [those] freedoms.").

a "substantial" amount of protected speech, "judged in relation to [its] plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

In response to the FCC's new hard line, the National Association of Broadcasters earlier drew this Court's attention to the many broadcasters who "have been strong-armed into consent decrees that mandate substantial self-censorship even when there is only a *preliminary* suggestion that indecent material may have been broadcast."[35] For example, 66 out of a total of 225 ABC affiliate stations declined to air the November 11, 2004 network broadcast of "Saving Private Ryan" following the FCC's release of the *Golden Globe Awards Order*,[36] despite the fact that the Enforcement Bureau previously had held that an unedited broadcast of the same film did not violate indecency regulations.[37]

The FCC's policy shift also has chilled news reporting across the country. New York station WNET cut an image of graffiti that read "Fuck America" from video shot in Baku, Azerbaijan for its series addressing the United States' challenge in maintaining a stable supply of oil. Despite the fact that intense hostility to the United States was crucial to the program's message, the station was too uncertain about the FCC's policy to risk its inclusion.[38] Simi-

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[35] Brief for *Amici Curiae* National Association of Broadcasters and Radio Television News Directors Association in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 8, 2008, at 3 ("NAB 2008 Br.").

[36] *Id.* at 20.

[37] *Saving Private Ryan Order*," 20 FCCRcd 4507, ¶4.

[38] Brief for *Amici Curiae* Public Broadcasters in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 2008, at 14

larly crucial content was withheld from the American public when, due to the soldiers' explicit language, PBS affiliates rejected broadcast footage from Iraq.[39]

Likewise, out of an overabundance of caution, some broadcasters refused to air a Peabody Award-winning documentary of the September 11 attacks, while others censored or delayed Ken Burns' World War II documentary "The War," because the fourteen-hour film series contained four expletives.[40] Liability concerns prompted other stations to edit a documentary about President George H.W. Bush, which narration repeated a conversation in which President Lyndon Johnson advised President Bush (then a member of the House) to run for Senate because "the difference between being the member of the Senate and a member of the House is the difference between chicken salad and chicken shit."[41]

Frontline took a scalpel to its documentary "The Soldier's Heart," which reported U.S. soldiers' difficulties in seeking treatment for post traumatic stress disorder while serving in Iraq, only to be chastised by the Commission for not taking an ax. Its producer excised the word "fucking" from a segment in which a

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("PBS Br."). *See also* NAB 2008 Br. at 24, n. 15. (reporting that television stations in Phoenix, Arizona cut away from live coverage of a former NFL star and Army Ranger, Pat Tillman, who was killed in combat operations in Afghanistan, as his brother twice stated that he was "fucking dead.").

[39] NAB 2008 Br. at 25, n. 17.

[40] *Id.* at 21-22, n.8, n.10.

[41] PBS Br. at 13 (discussing this example among several others.).

veterans' advocate revealed a soldier suffering from PTSD was called a "fucking pussy" by superiors seeking to set an example discouraging other sufferers. This prompted an FCC Letter of Inquiry regarding inclusion of "pussy."[42] Such a letter would be particularly persuasive in the editorial departments of struggling stations given the FCC's decision to combine its policy shift with a ten-fold hike in the dollar figure for the maximum monetary forfeiture for uttering a single expletive – from $32,500 to $325,000 per station.[43]

Caution is the only option for those independent broadcasters who wish to remain viable in difficult economic times. The Commission fined the San Mateo County Community College District $15,000 for airing *The Blues* with fleeting expletive use by actual blues producers and hip-hop artists.[44] The independent Aerco Broadcasting Company fared even worse, being slapped with a $220,000 fine for showing racy Spanish-language music videos.[45] While producers of Fox's "Prison Break" may have the luxury of "hir[ing] a Spanish language consultant after it was learned that Spanish words that were completely acceptable when spoken by a Puerto Rican character might mean something different in

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[42] *See* PBS Br. at 14-15.

[43] *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006).

[44] *Omnibus Order* ¶86 (JA 94).

[45] *Omnibus Order* ¶237 (JA 173).

another Hispanic culture,"[46] independent producers struggling for program carriage may not.

In an effort to avoid hefty fines for inadvertent slips, one broadcaster spent approximately $200,000 to outfit its 24 stations with delay technology to censor live programming.[47] As budgets tighten, stations may choose to stop airing any live programming. Per PBS's calculus in 2008, the new maximum forfeiture meant that if all (then 356) of its member stations carried a broadcast containing a single expletive, their exposure would be more than $115 million, which was then nearly a third of the total federal support for public broadcasting.[48] Such a price-tag renders it reasonable for 80% of PBS affiliates to reject broadcast footage from the time leading up to Iraqi elections and the battle of Fallujah because soldiers used explicit language.[49]

While penalties are levied on licensees, their economic consequences flow downstream to creators and performers, some of whom have been forced to indemnify their employers.[50] As if that were not

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[46] Decl. of Nicole A. Bernard on Behalf of Fox Television Stations, Inc., In the Matter of Remand of Section III.B of the Commission's Mar. 15, 2006 *Omnibus Order* Resolving Numerous Broadcast Television Indecency Complaints, Sept. 20, 2006, at 4 (JA 284).

[47] *See* NAB 2008 Br. at 26, n. 19.

[48] Brief for *Amici Curiae* Public Broadcasters in Support of Respondents, *FCC v. Fox, et al.*, No. 07-582, Aug. 2008, at 12.

[49] Letter from Jim Dyke, Executive Dir., TV Watch to FCC, Sept. 21, 2006, Exh. A, at 3 (JA 279).

[50] *See, e.g.*, Frank Ahrens, "Six-Figure Fines for Four-Letter Words Worry Broadcasters," WASH. POST, July 11, 2006, 2006 WLNR 11941250.

enough deterrent, the Commission further has abused its narrow indecency powers by extracting consent decrees reaching deeply into the employment practices of broadcasters. *In re Clear Channel Commc'ns Inc.*, 19 FCCRcd. 10,800, 10,886 (2004), for example, involved a consent decree requiring a broadcaster to ferret employees "materially participating" in the broadcasting of allegedly indecent content and in certain instances discipline on-air talent with remedial "significant time delay[s] – up to five minutes," or fire them altogether.

II. *RED LION* IS INAPPOSITE AND IRRELEVANT.

Attempting to gain a foot where an inch is in play, some broadcasters rail against the FCC's ability to structure spectrum licenses by arguing that this case puts at issue *Red Lion*'s "scarcity rationale."[51] The Government, whether in response or attempting to salvage an indecency regime that would be unconstitutional under *Pacifica*, tosses in its own attempt to frame this case as fundamentally questioning its sources of broadcast regulatory authority by suggesting *Red Lion* could preserve the policy at issue here.[52] With these arguments, both sides stretch the facts well beyond this case. The Court should follow its practice of rejecting calls for "formulat[ing] a rule of constitutional law broader

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[51] Brief in Opp'n of Fox, *et al.*, On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 27; Brief in Opp'n of ABC, Inc., et al., On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 30, 32.

[52] Pet'r's Br. 42-44.

than is required by the precise facts to which it is to be applied."[53]

The Court's inquiry properly should assess the facts and justifications behind the FCC's indecency regulations rather than examine unrelated issues of spectrum policy. This case presents the narrow question of the constitutionality of broadcast indecency regulations designed for censorship and sup-suppression, rendering *Red Lion* inapposite and irrelevant. The FCC acknowledged the same when it relied on *Pacifica*, not *Red Lion*, in its *Omnibus Order*, its *Golden Globes Order*, and its *Remand Order*. As Justice Breyer noted in his earlier dissent, with respect to a similarly belated attempt by the Government to save the FCC from itself, the Court here "must consider the lawfulness of an agency's decision on the basis of the reasons the agency gave, not on the basis of those it *might have* given. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 [] (1947).[54] And the FCC did not make this claim. Hence, we cannot take it into account and need not evaluate its merits."[55] When the FCC did attempt to list scarcity as

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[53] *See Kremens v. Bartley*, 431 U.S. 119, 136 (1977).

[54] *Chenery* held that when presented an administrative agency decision, a reviewing court may only affirm the decision based on grounds invoked by the agency. "If those grounds are inadequate or improper," the Court continued, "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Id.* at 196.

[55] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1838-39 (2009) (Breyer, J., dissenting) (rejecting the Solicitor General's attempt to defend the policy at issue by referencing the indecency statute's prohibition on the broadcast of any indecent language, and arguing its goal is to eliminate

one of its bases for authority for indecency, in *Pacifica*, this Court explicitly rejected its argument that the *Red Lion* scarcity rationale had any bearing.[56] So should it do here, in the event it rejects disposing of this argument swiftly through application of the *Chenery* Doctrine.

A. THIS COURT AND THE FCC HAVE ACKNOWLEDGED *RED LION* HAS NO BEARING ON INDECENCY REGULATION.

This case is about indecency regulations, a concept not discussed or even alluded to in *Red Lion*. Indeed, in his otherwise stinging dissent in *Pacifica*, Justice Brennan commended the other opinions' rejection of scarcity as a basis for indecency regulation.[57] "The opinions...rightly refrain from relying on the notion of 'spectrum scarcity' to support their result," he noted; for "although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship."[58]

As it was with *Pacifica*, *Red Lion* has no bearing on the current case, because that Court sought to

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nuisance, which even fleeting use of expletives can constitute) ("The Solicitor General adds that the statutory word "any" indicates that Congress did not intend a safe-harbor for a fleeting use of that language. The fatal flaw in this argument, however, lies in the fact that the Solicitor General and not the agency has made it.").

[56] *Pacifica*, 438 U.S. at 731, n.2. The Court disregarded that basis and rested its decision on the FCC's three other bases. *Compare id. with id.* at 748-51.

[57] *Id.* at 770, n.4.

[58] *Id.* (citations and internal quotations omitted).

expand access to broadcast frequencies to a wider swath of people than just incumbent broadcasters, whereas here this Court addresses the attempt to *inhibit* what is capable of being broadcast. *Red Lion* revolved around an individual who felt he had been personally attacked during a broadcast by the Red Lion Broadcasting Company and demanded free reply time to defend himself and state his position. 395 U.S. at 371-72. It was not about a broadcast containing indecent content or an attempt to regulate indecent content on broadcast frequencies. In recognition of *Red Lion*'s irrelevance to indecency regulation, in 1987, the Commission explicitly abandoned scarcity as a justification for indecency regulation,[59] and its abandonment continued with the Orders at issue in this case.

B. THE GOVERNMENT INTERESTS FURTHERED IN INDECENCY CASES DIFFER FROM THOSE IN *RED LION* CASES.

It is not only the facts of *Red Lion* that prevent the case from application to indecency regulation. In every aspect, *Red Lion* stands for the principle of providing broader access to broadcast frequencies.

The Court in *Red Lion* observed the government's stated interest to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," in light of "the right of the public to receive suitable access to social, political, esthetic, moral, and other

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[59] *Pacifica Found., Inc.*, 2FCCRcd 2698, 2699, *aff'd on recon.*, *Infinity Broadcasting Corp. of Pa.*, 3 FCCRcd 930 n.11 (1987), *aff'd in part, rev'd in part on other grounds, Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

ideas and experiences," which "may not constitutionally be abridged." 395 U.S. at 390. This is starkly different from, and unrelated to, the government's interests in indecency regulations, which relate to protecting children from patently offensive content and ensuring an individual's privacy in her home.[60]

With that speech-promoting interest in mind, *Red Lion* favors protecting and encouraging wider access to broadcast frequencies by allowing for "those unable without government assistance to gain access to those frequencies for expression of their views." 395 U.S. at 401. To that end, that Court took into account "the scarcity of broadcast frequencies," the government's "role in allocating" frequencies, and the "legitimate claims" of other "potential users." *Id.* at 400-01. In so doing, the Court applied a "less rigorous standard of First Amendment scrutiny,"[61] which several circuit courts since have described as "rational basis,"[62] and which this Court since has applied to uphold laws or regulations that are "a reasonable means" of "promoting the public interest in diversified mass communications."[63]

As a means of promoting that public interest, this Court has endorsed attempts to foster diverse infor-

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[60] *See generally Pacifica*, 438 U.S. at 748-49.

[61] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994) ("*Turner I*").

[62] *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 167 (D.C. Cir. 2002); *Fox TV Stations v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002).

[63] *See FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 802 (1978) ("*FCC v. NCCB*").

mation sources in cases involving broadcasting,[64] cable,[65] and newspapers,[66] and has upheld lower courts endorsing diverse information sources through telephone networks.[67] In the seminal case *Turner Broadcasting System v. FCC* ("*Turner I*"), the Court held that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[68]

Red Lion's focus on spectrum allocation is inapposite to that here. Here, the Government's concern is akin to that in *Pacifica*, which elucidated the rationales of pervasiveness, intrusiveness, and accessibility to children to justify the regulation of broadcasters' indecent speech.[69] The rationales used in *Pacifica* are perfectly suited for analysis of this case; whereas, the rationales used in *Red Lion* have no applicability to indecency regulations, as the Court acknowledged in *Pacifica*, *supra*.

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[64] *See, e.g., CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[65] *Turner I*, 512 U.S. at 663; *United States v. Midwest Video Corp.*, 406 U.S. 649, 668, n.27 (1972) (plurality opinion).

[66] *See, e.g., Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see also FCC v. NCCB*, 436 U.S. 775, 799 (1978) (upholding limitation on newspaper/broadcast cross-ownership).

[67] *See United States v. AT&T*, 552 F. Supp 131, 183-86 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[68] *Turner I*, 512 U.S. at 663; *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 190, 227 (Breyer, J., concurring) ("*Turner II*").

[69] For a fuller discussion of the differing lines of precedent governing the constitutionality of these two different sets of governmental actions, *see generally* Yale Br. at 8-25.

In cases of broadcast regulation, courts have been able to determine whether the government is attempting to target and suppress particular views and particular content, applying a heightened scrutiny for suppressing editorializing,[70] commercial speech,[71] and indecency.[72] Were *Red Lion* nevertheless ripe for revisitation, broadcasters could bring the appropriate case. This is not that.

C. REVISITING *RED LION* WOULD CREATE A HOST OF PROBLEMS AND SOLVE NONE.

Respondents believe that the FCC's policies do not pass muster under *Pacifica*. Were this Court, however, to find *Pacifica*'s reconsideration expedient, the broader regulatory landscape would see limited effects. Until recently, the FCC has been cautious in policing indecency; thus revisiting *Pacifica* at most would affect indecency regulation in broadcast media, and upset a plurality opinion regarding cable basic-tier programming.[73] No case relying on *Pacifica* has explicitly applied a standard other than strict scrutiny; as such its reconsideration to provide

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[70] *See FCC v. League of Women Voters of California*, 468 U.S. 364, 376 (1984).

[71] *See, e.g., Greater New Orleans Broadcasting Ass'n v. FCC*, 527 U.S. 173 (1999).

[72] *See Action for Children's Television v. FCC*, 58 F.3d at 660.

[73] *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality) (not announcing a standard, but merely reasoning by analogy to *Pacifica*).

broadcasters greater breathing room on indecency likely would minimally impact other regulation.[74]

Revisiting *Red Lion* is another matter. *Red Lion* continues to serve as bedrock for valuable telecommunications policy. As a result, casting doubt upon *Red Lion*'s scarcity rationale affects the infrastructure for diverse and informed public debate on issues central to self-governance.[75] Questioning *Red Lion*, even in *dicta*, in a proceeding that does not rely upon the scarcity rationale, could upset the many discourse-promoting regulations it has served to support, throwing media, Internet and spectrum policy into chaos.[76]

With its associated line of cases,[77] *Red Lion* remains precedent for three major classes of statutes and regulations, all of which differ from indecency regulations. The constitutionality of each of them would be jeopardized were *Red Lion* altered.

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[74] *See, e.g., Action for Children's Television v. FCC*, 58 F.3d at 661 (applying "strict scrutiny to [broadcast indecency regulation] regardless of the medium affected by them," while asserting that the Court's "assessment...must necessarily take into account the unique context of the broadcast medium."). Dissenters agreed with respect to the application of strict scrutiny, *see id.* at 670 (Edwards, J., dissenting) (requiring "least restrictive means..."). *See also id.* at 684 (Wald, J., joined by Tatel J. and Rogers, J.) (indecency regulation "must be narrowly tailored to a compelling government interest.").

[75] *See generally* Yale Br. at 16-23.

[76] *See also id.* at 26-29 (arguing same).

[77] *See, e.g., FCC v. Nat'l Citizens Comm. For Broad.*, 436 U.S. 775 (1978); *NBC v. United States*, 319 U.S. 190, 213 (1943); *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

First, *Red Lion* structures the media so as to ensure the widest dissemination by diverse sources. In this connection, *Red Lion* is the authority for rules relating to the structure and ownership of media and telecommunications. Specifically, altering its holding would effectively overrule *FCC v. NCCB*, which upheld the FCC's newspaper/broadcast cross-ownership rules, 47 CFR §73.3555(d), against constitutional challenge. [78] Moreover, *Red Lion* serves as basis for two other ownership statutes:

- Sections 202(b)-(c) of the Telecommunications Act of 1996, which impose ownership limits on TV and radio holdings.[79]

and

- 47 USC §335, which requires direct broadcast satellites to set aside at least four percent of their channel capacity for noncommercial, educational and informational programming.

Separately, *Red Lion* is a principal justification for must-carry statutes, including 47 USC §§532-533, which were upheld in *Turner I*, and lends the rationale for supporting the Satellite Television Extension and Localism Act of 2010, P.L. 111-151, which governs the retransmission of local TV broad-

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[78] *FCC v. NCCB*, 436 U.S. at 802 (broadcasting ownership limitations are reasonable means to of "promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will not be denied broadcast licenses pursuant to them."). *See also Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

[79] Related, questioning *Red Lion* also could invalidate 47 CFR §73.3556, which sets a limit on the duplication of programming on commonly-owned stations.

cast programming on direct broadcast satellites.[80] Another structural category affected by *Red Lion* involves build-out[81] and universal service mandates effectuated through the licensing process.[82]

Second, *Red Lion* provides the foundation for laws promoting an informed electorate, including by ensuring political, educational and noncommercial programming.[83] In this respect, *Red Lion* served as a

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[80] An earlier version of this statute was upheld by the Fourth Circuit in *Satellite Broadcasting and Communications Association v. FCC*, 275 F.3d 337. *See id.* at 356 ("Congress enacted the carry one, carry all rule to 'preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources." (quoting H.R. Conf Rep. Nol. 106-464 at 101 (1999).)

[81] Because of *Red Lion*, the FCC can routinely impose build-out requirements on wireless licensees, *see, e.g.*, Service Rules for the 698-746, 747-762 And 777-792 Mhz Bands, WT Docket No. 06-150, 23 FCCRcd 8047, 8053-54 (2008), without facing First Amendment challenges like the ones raised by cable operators against similar build-out laws, *see, e.g., Century Federal, Inc. v. City of Palo Alto*, 719 F.Supp. 1552, 1554 (N.D. Cal. 1987) (striking down cable build-out rules).

[82] *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 360 (1958). *See also* Amendment of Section 3.606 of Comm'n's Rules & Regulations, Sixth Report & Order, 41 FCC 148, 167 (1952) (providing as the first three priorities of allocation: "(1) To provide at least one television service to all parts of the United States. (2) To provide each community with at least one television broadcast station. (3) To provide a choice of at least two television services to all parts of the United States.").

[83] The constitutional vitality of numerous other statutes and other regulations depends on scarcity. These include the Commercial Advertisement Loudness Mitigation ("CALM") Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 USC § 621)(limiting the volume of TV commercials); The Twenty-First Century Communications and Video Accessibility Act of 2010,

basis for implementation of campaign disclosure requirements. With *Red Lion* could go the constitutionality of

- 47 USC §312(a)(7), as upheld in *CBS, Inc. v. FCC*,[84] affording federal candidates with a right of "reasonable access" to broadcast air time;
- 47 USC §315(a), the so-called "equal time" right for candidates for public office;
- 47 USC §315(b), which gives candidates the right to a discounted rate for air time;
- 47 USC §335(a), which applies public interest "equal time" and "reasonable access" provisions to direct broadcast satellites; and
- The Children's Television Act of 1990, 47 USC §§ 303a-303b, which mandates the carriage of minimum amounts of informational and educational programming for children.[85]

Pub. L. No. 111-260, 124 Stat. 2751, §202(b) (2010) (requiring video descriptions to assist the visually impaired); 47 CFR §73.1206 (notice that a telephone conversation is being broadcast); 47 CFR §73.1210 (limiting dual language broadcasts in Puerto Rico); and 47 CFR §73.1216 (regulating licensee-conducted contests).

[84] *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[85] Children's Television Programming, 11 FCCRcd 10660, 10729-34 (1996) (implementing The Children's Television Act of 1990). An accompanying Senate Report analyzed the constitutional issues and concluded the Act was constitutional under *Red Lion*. S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989).

Third, there is no reason to throw into doubt every single one of the tens of thousands of spectrum licenses conferred by the FCC or held by government, while reviewing a case limited to a few debatable television broadcasts.

The licensing process, including marine, wireless telephony, aviation and other services depends on *Red Lion* and scarcity, as it is *Red Lion* that allows the government to balance competing rights to the radio spectrum to promote First Amendment goals.[86] With respect to spectrum (unlike in parks, print journals or the Internet), the government can license because of *Red Lion* and the "scarcity rationale." Absent that precedent, spectrum would become yet another forum in which the government neither can silence the millions of Americans lacking a license[87] nor license speakers.[88] Without *Red Lion*, every pirate radio station would stand on the same ground from a First Amendment standpoint as every licensed broadcaster. In fact, questioning *Red Lion* could undermine every spectrum license held by a private or government party.

Without the scarcity rationale, under *Forsyth*, the government would be forced to defend each license under strict scrutiny, and likely would fail repeatedly against arguments that valuable spectrum is

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[86] *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03, 110 (1973).

[87] *Cf. Red Lion*, 395 U.S. at 389 ("[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.").

[88] *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992).

being misallocated to television broadcasting and the vast "white spaces" designed to protect unwatched signals.[89]

Another potential result of questioning *Red Lion* in this case would be ceding *Red Lion*'s ground to the intermediate scrutiny of *Turner Broadcasting System v. FCC*.[90] Through a narrow tailoring requirement, *Turner* protects incumbent speakers at the expense of others. Therefore, unlike under *Red Lion*, under *Turner*, the government can promote the widest dissemination of diverse and antagonistic sources only if the "burden" on an incumbent speaker is relatively minimal.[91] As a result, under *Turner*'s intermediate scrutiny, lower courts have held national and vertical cable ownership limits to be impermissible under the First Amendment,[92] and similarly invalidated common carriage rules applied to telephone video service.[93]

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[89] *See* Sascha D. Meinrath & Michael Calabrese, "Unlicensed 'White Space Device' Operations on the TV Band and the Myth of Harmful Interference," Mar. 2008, http://www.newamerica.net/files/WSDBackgrounder.pdf. See *also Yale Br.* at 27-28, n.59 (discussing same).

[90] *Turner I*, 512 U.S. 622 (1994); *Turner II*, 520 U.S. 180 (1997).

[91] *See Turner I*, 512 U.S. at 662-63.

[92] *Time Warner Ent. Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001); *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

[93] *Chesapeake & Potomac Telephone Co. v. United States*, 42 F.3d 181 (4th Cir. 1994). This Court granted *cert.*, 515 U.S. 1157 (1995), and heard oral arguments, after which the President signed the Telecommunications Act of 1996 into law. The Act repealed Section 533(b), allowing LECs to provide local cable service if they complied with a series of regulatory measures. Thereafter, the Court instructed the Fourth Circuit

If *Turner* applied to spectrum, incessant constitutional litigation would ensue. Every decision regarding the allocation, licensing, unlicensing, band clearing and conditioning spectrum for any purpose would be subject to attack. Likely, applying *Turner* to spectrum would mean overturning diversifying rules and ensuring the narrowest diversity of sources for Americans, at the expense of competition and democracy.

Finally, another reason not to revisit *Red Lion*'s scarcity rationale is the simple fact that it remains valid. *Red Lion* makes plain that the scarcity to which the Court referred was determined by demand:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government form

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to reconsider the case and determine whether it had become moot, 516 U.S. 415 (1996). Nevertheless, the earlier opinion illustrates potential ramifications of the standard's application absent *Red Lion*.

> making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.[94]

Thus, the proper question is not how many outlets there are, or how many outlets are technologically feasible, but how great the demand is for the available spectrum in light of the regulatory scheme.

Presently the demand is great. Spectrum scarcity is frequently stressed by FCC Chairman Genachowski, and President Obama included spectrum auctions in his recent jobs plan.[95] In recent remarks, Steve Largent, President of CTIA, the International Association for the Wireless Telecommunications Industry, noted that implicit in the growing subscriber numbers is "a catch, and it's a big one. ...We have to get more spectrum," or the U.S. faces "one heck of a traffic jam."[96] Those representing the interests of TV stations, on the other hand, argue that the wireless carriers' "inability to work together

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[94] *Red Lion*, 395 U.S. at 388-89.

[95] *See* Brief in Opposition of Intervenors Center for Creative Voices in Media and The Future of Music Coalition, On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 5-7 (discussing Chairman's remarks regarding "demand for spectrum [] dramatically outstripping supply," and "spectrum crunch [due to] demand from all consumers in the U.S. compared to aggregate supply of spectrum."). *See also* Gautham Nagesh, "Pressure Mounts on Supercommittee to Tackle Spectrum," The Hill: Hillicon Valley, Oct. 16, 2011. *Available* at http://thehill.com/blogs/hillicon-valley/technology/187813-pressure-mounts-on-supercommittee-to-tackle-spectrum.

[96] "AT&T/T-Mobile Barely Mentioned as CTIA Fall Shows Starts," COMM. DAILY, Oct. 12, 2011.

and roll out advanced networks has led to the false 'wireless crunch.'"[97] That argument only underscores the fact that everyone wants spectrum, regardless of the validity of any given claim to it.

Though the Commission has yet to devise a mechanism for appeasing the competing demands of wireless companies and broadcasters for spectrum, the Congressional Budget Office recently estimated that Commission-held incentive auctions, in addition to other spectrum auctions, could raise as much as 23.3 billion for the Treasury over the next several years.[98] Citing estimates that spectrum auctions could raise $30 billion in bids from carriers, Mr. Largent affirmed his constituency's serious interest: "I don't know of many industries that are eager to step up and write checks like that to the government, but we are."

Whether more spectrum is needed for other uses, or whether instead the special privileges given to broadcast licensees should be taken away, may be up for debate, earlier assessments notwithstanding. But these questions only emphasize the extent to which this case fails to present a record on which this Court can assess the validity of *Red Lion*'s scarcity rationale.

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[97] *See, e.g.*, "Comm. Daily Notebook," COMM. DAILY, Oct. 12, 2011, at 14.

[98] Paul Barbagallo, "CBO Estimates $15.8B in Savings From Incentive Auctions, Spectrum Fees," Bureau of National Affairs, Oct. 13, 2011. *Available* at http://www.bna.com/cbo-estimates-158b-n12884903858/.

CONCLUSION

Applying *Pacifica*, the Court should strike down the FCC's unconstitutionally vague indecency policy. Upon reassessing the basis for limited constitutional scrutiny of broadcast indecency regulation, the Court may choose to strike down *Pacifica*'s limitations on speech. But in any event this Court need not, and should not, question *Red Lion* or its scarcity rationale, which are not explored in the opinions below and irrelevant to this case.

Respectfully submitted,

*ANDREW JAY SCHWARTZMAN
CHRYSTIANE B. PEREIRA
MEDIA ACCESS PROJECT
1625 K STREET, NW
SUITE 1000
WASHINGTON, DC 20006
(202) 232-4300

November 3, 2011

*Counsel of Record

RESPONDENT'S BRIEF

RECORD AND BRIEFS

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IN THE

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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS FOX TELEVISION STATIONS, INC.; NBCUNIVERSAL MEDIA, LLC; CBS BROADCASTING INC.; & FBC TELEVISION AFFILIATES ASSOCIATION

ELLEN S. AGRESS
MAUREEN A. O'CONNELL
FOX TELEVISION STATIONS, INC.
1211 Avenue of the Americas
New York, NY 10036
(212) 252-7204

CARTER G. PHILLIPS*
MARK D. SCHNEIDER
JAMES P. YOUNG
DAVID S. PETRON
RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondent Fox Television Stations, Inc.

November 3, 2011 * Counsel of Record
[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

SUSAN WEINER
NBC UNIVERSAL, INC.
30 Rockefeller Plaza
New York, NY 10112

MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

Counsel for Respondent NBCUniversal Media, LLC

JONATHAN H. ANSCHELL
CBS BROADCASTING INC.
4024 Radford Avenue
Studio City, CA 91604
(818) 655-1631

SUSANNA M. LOWY
CBS BROADCASTING INC.
51 West 52nd Street
New York, NY 10019
(212) 975-3406

ROBERT CORN-REVERE
RONALD G. LONDON
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW Suite 800
Washington, DC 20006
(202) 973-4200

Counsel for Respondent CBS Broadcasting Inc.

JOHN R. FEORE, JR.
KEVIN P. LATEK
DOW LOHNES PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20036
(202) 776-2000

Counsel for Respondent FBC Television Affiliates Association

QUESTION PRESENTED

Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.

RULE 29.6 CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

Fox Television Stations, Inc. is a wholly-owned indirect subsidiary of News Corporation, a publicly held company.

NBCUniversal Media, LLC was formerly known as NBC Universal, Inc. and is the indirect parent of NBC Telemundo License LLC, which itself was formerly known as NBC Telemundo License Co. NBCUniversal Media, LLC is a Delaware limited liability company and is indirectly owned 51% by Comcast Corporation and 49% by General Electric Company.

CBS Broadcasting Inc. states that it is a wholly owned indirect subsidiary of CBS Corporation, which is a publicly traded corporation. CBS Corporation is aware that GAMCO Investors, Inc., a publicly-traded corporation, along with certain entities and persons affiliated therewith, filed a Schedule 13D with the Securities and Exchange Commission on March 15, 2011, which asserts ownership of 10.1% of CBS Corporation's Class A voting stock.

FBC Television Affiliates Association is a Delaware non-stock corporation operating as a non-profit entity. No publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENTS	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	3
A. The FCC's Initial Indecency-Enforcement Policy	3
B. The FCC's New Indecency-Enforcement Policy	6
C. The Preceding Decisions	10
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. THE FCC'S INDECENCY ENFORCEMENT POLICY VIOLATES THE FIRST AMENDMENT.	15
A. This Court Should Overrule *Pacifica*	17
1. Broadcasting Is Not Uniquely Pervasive	18
2. Broadcasting Is Not Uniquely Accessible To Children	21
B. Even Under *Pacifica*, The FCC's Expanded Indecency Regime Is Unconstitutional	26
1. The FCC's Interest Is Not Substantial	27
2. The FCC's Current Enforcement Policy Is Not Narrowly Tailored	32

TABLE OF CONTENTS—continued

Page

C. Petitioners' Reliance On The Scarcity Doctrine Is Misplaced. 35

II. THE FCC'S NEW INDECENCY-ENFORCEMENT POLICY IS UNCONSTITUTIONALLY VAGUE. 39

A. The FCC's New Indecency Policy Authorizes Arbitrary And Discriminatory Enforcement. 42

B. The FCC's New Indecency Policy Fails To Provide Fair Notice Of What Is Prohibited. 47

C. Petitioners' Attempts To Salvage The FCC's Vague Policy Are Unavailing..... 51

CONCLUSION 57

TABLE OF AUTHORITIES

CASES Page

ACT v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988), *superseded in part by* 58 F.3d 654 (D.C. Cir. 1995) 40
ACT v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) ... 37
Agostini v. *Felton*, 521 U.S. 203 (1997) 24
Ark. AFL-CIO v. *FCC*, 11 F.3d 1430 (8th Cir. 1993) 37
Ashcroft v. *ACLU*, 542 U.S. 656 (2004) 22, 33
Bethel Sch. Dist. No. 403 v. *Fraser*, 478 U.S. 675 (1986) 28
Bolger v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) 16
Brown v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) ..... *passim*
CBS, Inc. v. *DNC*, 412 U.S. 94 (1973) .. 32, 34, 37
City of Chi. v. *Morales*, 527 U.S. 41 (1999) .. 42
Coates v. *City of Cincinnati*, 402 U.S. 611 (1971) 49
Cohen v. *California*, 403 U.S. 15 (1971) ... *passim*
Connally v. *Gen. Constr. Co.*, 269 U.S. 385 (1926) 47
Denver Area Educ. Telecomms. Consortium, Inc. v. *FCC*, 518 U.S. 727 (1996).. *passim*
Erznoznik v. *Jacksonville*, 422 U.S. 205 (1975) 29, 30
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) ..... *passim*
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Fox Television Stations, Inc. v. *FCC*, 489 F.3d 444 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009) 10

TABLE OF AUTHORITIES—continued

Page

Gentile v. *State Bar*, 501 U.S. 1030 (1991).. 42, 52
Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966)..... 42, 43, 52
Ginsberg v. *New York*, 390 U.S. 629 (1968)..... 28
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)..... 39, 52
Hill v. *Colorado*, 530 U.S. 703 (2000)..... 41, 42
Holder v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010)..... 40, 47, 52
Kolender v. *Lawson*, 461 U.S. 352 (1983)..... *passim*
Kovacs v. *Cooper*, 336 U.S. 77 (1949) 20
Miami Herald Publ'g Co. v. *Tornillo*, 418 U.S. 241 (1974)..... 16
Morse v. *Frederick*, 551 U.S. 393 (2007)..... 28
Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972)..... 41, 47
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized by Landgraph* v. *USI Film Prods.*, 511 U.S. 244 (1994)..... 25
Payne v. *Tennessee*, 501 U.S. 808 (1991)..... 24
Perry v. *Sindermann*, 408 U.S. 593 (1972)... 35
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969)..... 11, 36
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Sable Commc'ns of Cal., Inc. v. *FCC*, 492 U.S. 115 (1989)..... 16, 17, 22, 27
Smith v. *California*, 361 U.S. 147 (1959)..... 39
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TABLE OF AUTHORITIES—continued

Page

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Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622 (1994) 32, 35, 37
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United States v. *Nat'l Dairy Prods. Corp.*, 372 U.S. 29 (1963) 52
United States v. *Playboy Entm't Grp.*, 529 U.S. 803 (2000) ..... *passim*
United States v. *Powell*, 423 U.S. 87 (1975) 53
United States v. *Williams*, 553 U.S. 285 (2008) 42, 49
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 24
Vill. of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 49
Winters v. *New York*, 333 U.S. 507 (1948) ... 47, 52

STATUTES

Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) 7
Radio Act of 1927, ch. 169, 44 Stat. 1162 ..... 3, 38
18 U.S.C. § 1464 ..... 3, 38, 40
47 U.S.C. § 326 3
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TABLE OF AUTHORITIES—continued

ADMINSITRATIVE DECISIONS Page

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TABLE OF AUTHORITIES—continued

Page

Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999 (2001) 5, 6

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Page

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INTRODUCTION

For more than 30 years, broadcasting alone among all mass media has been a second-class citizen. Only broadcasting is subject to content-based censorship by the federal government, simply because this Court in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 729 (1978), believed that broadcasting was at the time unique, and thus uniquely without full First Amendment protection. Over the past three decades, however, the media marketplace has changed dramatically, thoroughly undermining *Pacifica*'s rationale for its unequal treatment of broadcast speech under the First Amendment. Today, broadcasting is neither uniquely pervasive nor uniquely accessible to children, yet broadcasters are still denied the same basic First Amendment freedoms as other media. This Court's pronouncements from 1978 continue to bind the lower courts as they attempt to reconcile the FCC's increasingly aggressive suppression of broadcast speech with the fundamental notion that government censorship of speech—all speech—is the core of what the First Amendment was intended to prevent.

The Court should reject petitioners' request to ignore this broader reality and to uphold the FCC's authority to continue to censor speech as if nothing has changed. Instead, the Court should announce firmly and finally that the time for treating broadcast speech differently than all other communications is over. To the average American viewer, broadcasting is just one source among hundreds in a media-saturated environment, a mere press of a button on the remote control away from other, fully protected sources. The day has come for the FCC's indecency regime to be subjected to the same strict standards

that apply to all government attempts to abridge freedom of speech. The FCC's indecency regime is the antithesis of what the First Amendment permits and should be declared unconstitutional.

If the Court is not prepared to revisit *Pacifica* for reasons of stare decisis, it still should recognize that its holding cannot be expanded. If the media environment of the 1970s barely justified restrictions on "shocking" and "repeated" uses of expletives in broadcasts, then the media environment of the 2010s, *a fortiori*, prohibits the FCC's attempt to sweep ever more speech within its censorship net. Even under *Pacifica*, there is no basis for the FCC to regulate fleeting expletives on live television or images of partial nudity on scripted programs. The broadcasts at issue in no way resemble the Carlin monologue, and the FCC's attempt to penalize them would have been rejected by this Court over 30 years ago. Further, the FCC's new enforcement regime is not narrowly tailored, which has caused broadcasters to self-censor to avoid enormous FCC fines. Strict fidelity to the exceedingly narrow holding of *Pacifica* requires the Court to strike down the orders in this case.

Apart from these First Amendment problems, the FCC's indecency-enforcement regime is impermissibly vague. The FCC has erected a purely subjective regime that permits Commissioners to pursue their personal predilections. Broadcasters have no fair notice of what these Commissioners may deem indecent, resulting in an intolerable chill on broadcast speech.

COUNTERSTATEMENT OF THE CASE

A. The FCC's Initial Indecency-Enforcement Policy.

Originally enacted as part of the Radio Act of 1927, § 1464 of the federal criminal code provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464; Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1172-73. In the same enactment, however, Congress also provided that "[n]othing" in the Act gives "the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station," and no regulation or condition could "interfere with the right of free speech by means of radio communications." Radio Act of 1927, ch. 169, § 29, 44 Stat. at 1172-73; 47 U.S.C. § 326. Congress later gave the FCC authority to enforce § 1464 through civil forfeitures against either broadcast licensees or the public at large. 47 U.S.C. § 503(b).

The FCC did not interpret § 1464 to ban "indecent" language as distinct from "obscene" language until 1970. *WUHY-FM, E. Educ. Radio*, 24 F.C.C.2d 408, 412-14, ¶¶ 10-14 (1970). Recognizing that it was regulating speech and not widgets, the FCC emphasized that for indecency it could "act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee's favor." *Id.* at 414, ¶ 14. While believing its approach was consistent with the First Amendment, the FCC "welcome[d]" review by the courts. *Id.* at 415, ¶ 16.

That opportunity came in 1975. The FCC addressed a complaint involving an afternoon radio broadcast of George Carlin's "Filthy Words" mono-

logue. *Citizens Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, 95, ¶ 4 (1975) ("*Pacifica Order*"). During the monologue, Carlin used the words "fuck" and "shit," "repeat[ing] them over and over again in a variety of colloquialisms," many of which vividly evoked sexual or excretory images. *Pacifica*, 438 U.S. at 729. The FCC defined indecent speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs" and is broadcast "at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica Order*, 56 F.C.C.2d at 98, ¶ 11. The FCC found that the Carlin broadcast, involving offensive "words repeated over and over" in a "pre-recorded" broadcast, was "indecent" and "could have been"—but ultimately was not—"the subject of administrative sanctions." *Id.* at 99, ¶ 14.

The FCC's decision survived judicial review by only the slimmest of margins. This Court agreed that the FCC could prohibit "indecent" speech and that "the repetitive, deliberate use of" certain "words that referred to excretory or sexual activities or organs . . . in an afternoon broadcast when children are in the audience" was "indecent within the meaning of § 1464." *Pacifica*, 438 U.S. at 739-41. The Court determined that the FCC's decision was constitutional because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and "broadcasting is uniquely accessible to children." *Id.* at 748-49.

In supplying the crucial votes for *Pacifica*'s 5-4 majority, however, Justices Powell and Blackmun emphasized that the decision addressed only the "verbal shock treatment" caused by broadcasting

Carlin's repeated expletives. *Id.* at 757 (Powell, J., concurring). They explained that the FCC's "holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61 (Powell, J., concurring); *accord*, *id.* at 750 (opinion of the Court). The FCC does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Id.* at 759-60 (Powell, J., concurring). Both Justices voted to uphold the FCC's order only because the FCC "may be expected to proceed cautiously, as it has in the past." *Id.* at 762 n.4.

For roughly 25 years following *Pacifica*, the FCC interpreted the term "indecent" to prohibit only broadcasts as egregiously shocking as Carlin's monologue. See, *e.g.*, *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1252-53, 1254, ¶¶ 5-7, 10 (1978) ("We intend strictly to observe the narrowness of the *Pacifica* holding."). In 1987, the FCC reiterated that it viewed "the Court's holding in *Pacifica* as setting forth the legal test for indecency." *Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699, ¶¶ 11-13, *aff'd on recon.* 3 FCC Rcd. 930 (1987). Consistent with *Pacifica*, the FCC stated that "speech that is indecent must involve more than an isolated use of an offensive word." *Id.* at 2699, ¶ 13. For expletives, the "deliberate and repetitive use" of certain language "in a patently offensive manner" remained "a requisite to a finding of indecency." *Id.*

In 2001, the FCC issued a policy statement intended to provide guidance and clarification of its indecency-enforcement policies under § 1464. *Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding*

Broad. Indecency, 16 FCC Rcd. 7999, 8016, ¶ 30 n.23 (2001) ("*Indecency Policy Statement*"). The FCC reiterated that "indecent" material must (1) depict or describe sexual or excretory organs or activities, and (2) be "patently offensive" as measured by contemporary community standards for the broadcast medium. *Id.* at 8002, ¶¶ 7-8 (emphasis omitted). The FCC also distilled from its decisions three principal factors that it said guide its "patently offensive" determination: (a) the explicitness or graphic nature of the material; (b) the extent to which the broadcast dwells on or repeats the offensive material; and (c) the extent to which the material appears to pander or is used to titillate or shock. *Id.* at 8003, ¶ 10. To illustrate the application of these factors, the FCC provided examples from its existing caselaw, see *id.* at 8003-15, ¶¶ 11-23, noting several instances in which the fleeting use of an offensive word was not found indecent, *id.* at 8009, ¶ 18.

B. The FCC's New Indecency-Enforcement Policy.

1. In 2004, the FCC abandoned its previously restrained approach to indecency enforcement, beginning with its stance on isolated expletives. Pet. App. 7a-8a; *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4980, ¶ 12 (2004) ("*Golden Globe Order*"). The FCC considered a live awards show broadcast in which the singer Bono accepted an award stating that it was "'really, really fucking brilliant.'" *Id.* at 4976, ¶ 3 n.4. The FCC changed its policy, holding that the broadcast was indecent even though the expletive was not repeated and was used only as an intensifier, not a literal description of sexual activities. *Id.* at 4978, ¶ 8. The statement was patently offensive in the FCC's view

because it used one of the "most vulgar, graphic and explicit descriptions of sexual activity," and there was no "political, scientific or other independent value of use of the word here." *Id.* at 4979, ¶ 9.

The FCC also began imposing unprecedented fines for indecency violations. Pet. App. 8a. Under its current approach, the FCC issues a separate forfeiture to each network affiliate for the broadcast of the same program.[1] With the increase in the maximum fine from $32,500 to $325,000,[2] the FCC now claims the right to impose aggregate penalties that could exceed $65 million.

2. In response to the confusion and uncertainty created by its sudden change in course, the FCC adopted the *Omnibus Order* in February 2006, expressly to provide guidance and clarification of its new indecency policy. J.A. 41-43. In that order, the FCC held that Fox's live broadcasts of the 2002 and 2003 "Billboard Music Awards" violated § 1464. In the 2002 broadcast, Cher accepted an award and exulted that "'People have been telling me I'm on the way out every year, right? So fuck 'em.'" *Id.* at 101; Pet App. 88a. In the 2003 broadcast, presenter Nicole Richie ad-libbed: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." J.A. 106 & n.164; see also Pet. App. 9a, 44a. Citing the change in policy wrought in the *Golden*

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[1] *See, e.g.*, Br. in Opp'n of Fox Television Stations, Inc. et al. at 9 n.6, No. 10-1293 (filed May 23, 2011) (collecting examples); Pet. App. 8a n.3 (noting fines for 2003 of $440,000 and fines for 2004 of $8 million).

[2] *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, sec. 2, § 503(b)(2), 120 Stat. 491, 491 (2006) (codified at 47 U.S.C. § 503(b)(2)(C)(ii)).

Globe Order, the FCC discounted the fact "'that specific words or phrases are not sustained or repeated'" and found both broadcasts actionably indecent, even though the expletives were unscripted. J.A. 104, 108, 109. However, it "recognize[d] that [its] precedent at the time of the broadcast indicated that the Commission would not take enforcement action against isolated use of expletives." *Id.* at 105, 113.

The FCC decided numerous other indecency complaints in the *Omnibus Order* in an attempt to illustrate how the new policy would operate. The *Omnibus Order*, however, was a tableau of arbitrary and almost random outcomes. For example, the FCC found that the isolated use of the word "bullshit" in episodes of ABC's "NYPD Blue" was indecent, but the use of the words "dick" and "dickhead" were not. J.A. 113-18; see *id.* at 114 n.187. It found that uses of the words "fuck" and "shit" by the subjects of the Martin Scorsese documentary "The Blues: Godfathers and Sons" were indecent, even though similar uses of the same words in the film "Saving Private Ryan" were not. *Id.* at 90-91; see also *id.* at 188 (Adelstein, dissenting) ("common sense" dictates that the coarse language in "The Blues" was just as necessary to the realism of the documentary as it was in "Saving Private Ryan"). The FCC also found the utterance of "bullshitter" on the "Early Show" indecent, principally because it occurred during a news interview. *Id.* at 120-22.

3. Fox and the other broadcast networks challenged the *Omnibus Order* in the Second Circuit, and the FCC immediately sought voluntary remand to address the broadcasters' arguments. Pet. App. 10a, 41a. On remand, the FCC "vacate[d] Section III.B of the *Omnibus Order* in its entirety"—which dealt with

the two Fox broadcasts and episodes of "NYPD Blue" and "The Early Show"—"and replace[d] it" with a new decision on those broadcasts. *Id.* at 42a. In this *Remand Order*, the FCC reaffirmed the three principal factors that guide its patent offensiveness inquiry but explained that the FCC must "weigh and balance" the factors "because '[e]ach indecency case presents its own particular mix of these, and possibly other, factors.'" *Id.* at 46a (quoting *Indecency Policy Statement*, 16 FCC Rcd. at 8003, ¶ 10). The FCC added that in some cases "one or two of the factors may outweigh the others," thereby "rendering the broadcast material patently offensive and consequently indecent." *Id.*

The FCC also rejected various constitutional and statutory challenges to its new indecency policy. Pet. App. 59a, 76a-77a. The FCC concluded that basing patent offensiveness on "contemporary community standards" was not problematic because "in evaluating material, [it] rel[ies] on the Commission's 'collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens.'" *Id.* at 59a (quoting *Infinity Radio License, Inc.*, 19 FCC Rcd. 5022, 5026, ¶ 12 (2004)). The FCC concluded that its indecency definition was not impermissibly vague, *id.* at 76a-77a, and that, as in *Pacifica*, broadcast television remained "'uniquely pervasive'" and "'uniquely accessible to children.'" *Id.* at 78a-85a.

The *Remand Order* reaffirmed that the two "Billboard Music Awards" broadcasts were indecent. Pet. App. 46a-59a, 91a-95a. The FCC reversed its finding, however, that "The Early Show" was indecent. *Id.* at 98a-101a. Contrary to its view in the *Omnibus Order* that use of a potentially offensive

word during a news interview was the most important factor that made it indecent, J.A. 122, the FCC did an about-face, holding that use of the word during a news interview *saved* it from a finding of indecency. Pet. App. 100a-101a. But the FCC offered no comfort to broadcasters with this ruling: "there is no outright news exemption from [its] indecency rules." *Id.* at 100a.

C. The Preceding Decisions.

The broadcast networks sought review of both the *Omnibus* and *Remand Orders*, raising Administrative Procedure Act, statutory, and constitutional challenges. Pet. App. 11a. A divided panel of the Second Circuit initially vacated the orders on APA grounds, concluding that the FCC had not adequately justified its change in policy. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 446-47 (2d Cir. 2007). In dicta, the court questioned whether any explanation for the FCC's change in policy "would pass constitutional muster." *Id.* at 462.

This Court reversed the APA determination. *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) ("*Fox*"). Emphasizing that the First Amendment is irrelevant to the question of arbitrariness (*id.* at 1811-12; *id.* at 1818 n.7 (plurality opinion)), the Court held that the FCC's "new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious." *Id.* at 1812. The majority expressly "decline[d] to address the constitutional questions" raised and remanded. *Id.* at 1819.[3]

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[3] Several members of the Court nonetheless noted "the long shadow the First Amendment casts over what the [FCC] has done." *Fox*, 129 S. Ct. at 1828 (Ginsburg, J., dissenting). Justice Thomas noted the "questionable viability of the two

On remand, the Second Circuit unanimously ruled that the FCC's current enforcement policy is unconstitutional. At the outset, the court agreed with the networks that the media landscape had changed so dramatically that the factual underpinnings of this Court's decisions in *Pacifica* and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), which permitted heightened regulation of broadcast media, no longer appeared valid. Pet. App. 15a-17a. But "bound by Supreme Court precedent," the court of appeals evaluated the FCC's new indecency policy under *Pacifica*'s framework. *Id.* at 17a. The court concluded nonetheless that it need not resolve "the outer limit of the FCC's authority" under *Pacifica* as "the FCC's indecency policy is unconstitutional because it is impermissibly vague." *Id.* at 17a-18a.

The court of appeals explained that in *Reno* v. *ACLU*, 521 U.S. 844 (1997), this Court struck down a "definition of indecency [that] was almost identical to the [FCC's]." Pet. App. 21a. Recognizing that the FCC had "further elaborated" on its indecency standard in various enforcement orders, the Second

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precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case" and indicated that he would be "open to reconsideration of *Red Lion* and *Pacifica*." *Id.* at 1819-20, 1822 (Thomas, J., concurring). Justice Stevens, the author of the *Pacifica* decision, highlighted the narrowness of *Pacifica* and explained that the Court "did not decide whether an *isolated* expletive could qualify as indecent" and "certainly did not hold that any word with a sexual or scatological origin, however used, was indecent." *Id.* at 1827 (Stevens, J., dissenting). Justice Ginsburg similarly explained that the "*Pacifica* decision . . . was tightly cabined, and for good reason. . . . [W]ords unpalatable to some may be 'commonplace' for others, 'the stuff of everyday conversations.'" *Id.* at 1829 (Ginsburg, J., dissenting) (quoting *Pacifica*, 438 U.S. at 776 (Brennan, J., dissenting)).

Circuit concluded that whether the FCC's current indecency policy was impermissibly vague depended on whether "[t]his additional guidance [is] sufficient to survive a vagueness challenge." *Id.* The court found that it was not.

According to the court, the FCC's application of its patent offensiveness test "hardly gives broadcasters notice of how the [FCC] will apply the factors in the future," Pet. App. 24a, and its policy "results in a standard that even the FCC cannot articulate or apply consistently," *id.* at 27a. "With the FCC's indiscernible standards," the court explained, "come the risk that such standards will be enforced in a discriminatory manner." *Id.* at 28a. The Second Circuit also showed that the chilling effect of the FCC's policy was not theoretical: "there is ample evidence in the record that the FCC's indecency policy has chilled protected speech," including "news and public affairs programming" and "protected speech dealing with some of the most important and universal themes in art and literature." *Id.* at 31a-32a, 34a.

Shortly after the Second Circuit denied rehearing en banc in *Fox* v. *FCC*, the court applied that holding in another case involving a 2003 ABC broadcast of an episode of "NYPD Blue." Pet. App. 120a. In that episode, "an adult woman's nude buttocks" were depicted "for slightly less than seven seconds" in a scene that was intended to portray the awkwardness of new family situations. *Id.* at 120a-21a. The FCC found the "depiction of the buttocks was indecent" and fined "each of forty-four ABC-affiliated stations" for airing the episode. *Id.* at 122a. Before the Second Circuit, however, the FCC and United States "concede[d]" that *Fox* v. *FCC* controlled that case, and the court therefore held that "*Fox*'s determination

that the FCC's indecency policy is unconstitutionally vague binds this panel." *Id.* at 124a.

SUMMARY OF ARGUMENT

1. The time has come to overrule *Pacifica* and recognize that broadcasters have the same First Amendment protections as other media. Petitioners' principal defense of the FCC's indecency regime rests on the dual rationales identified by the Court in *Pacifica*, but those antiquated beliefs about the uniqueness of broadcasting are unquestionably no longer true. Broadcasting is not *uniquely* pervasive because Americans today spend more time engaged with cable and satellite television, the Internet, video games, and other media than they do with broadcast media. Nor is broadcasting *uniquely* accessible to children because other media are no less accessible than broadcasting. Moreover, the FCC is constitutionally required to rely on the myriad technological tools available today for parents to control or block a child's access to indecent material. The media upheaval since 1978 eviscerates *Pacifica*'s rationales, and principles of stare decisis must yield to these changed circumstances.

Even if stare decisis concerns are sufficient to preserve *Pacifica*, that "emphatically narrow" decision marks the outer limits of the FCC's constitutional authority to censor broadcast speech. Under any level of First Amendment scrutiny, the FCC's recent expansion of its indecency-enforcement regime beyond the kind of shocking material at issue in *Pacifica* cannot survive. The FCC has no substantial interest in protecting children from momentary exposure to offensive words or images solely in the broadcast medium. Nor is the FCC's newly expanded indecency policy narrowly tailored, as it is both

under- and over-inclusive and fails to rely on less restrictive alternatives to a crude ban on speech.

Petitioners cannot fall back on *Red Lion*'s scarcity doctrine to justify the FCC's new indecency-enforcement policy. Scarcity has never been the basis for punishing indecency—the Court in *Pacifica* did not rely on it, and the FCC in 1987 expressly disavowed it as a rationale—and 40 years of dramatic technological advances have now fatally undermined the basic assumptions on which the scarcity doctrine rests.

2. In any event, the Second Circuit correctly held that the FCC's new indecency-enforcement policy is unconstitutionally vague. Because this Court struck down an indecency definition materially indistinguishable from the FCC's as impermissibly vague, the Second Circuit correctly recognized that the FCC's new policy can survive a vagueness challenge only if the agency provided sufficient clarity through its "further elaborat[ion]" of that policy in other enforcement orders. Pet. App. 21a. As the court correctly held, the FCC's new policy as reflected in those orders is unconstitutionally vague for two independent reasons: it authorizes arbitrary and discriminatory enforcement, and it fails to provide fair notice of what is prohibited.

The Court should affirm the Second Circuit's judgment that the FCC's new policy permits arbitrary and discriminatory enforcement—a determination petitioners do not challenge. The "community standard" that the FCC uses to judge the patent offensiveness of material allows the FCC to pursue its own predilections because it rests entirely on the FCC's internal and oscillating experience. Similarly, the FCC's "patent offensiveness" inquiry is so

standardless that it permits the FCC to justify conflicting decisions at its whim.

The Second Circuit also correctly held that the FCC's new indecency policy, which rests on inherently subjective judgments about particular broadcasts, fails to provide fair notice to broadcasters of what will be found impermissible. And the FCC's failure to provide any objective standard, coupled with massive fines, has already chilled much broadcast speech.

Petitioners principally attack the Second Circuit's vagueness holding on procedural grounds, but those arguments fail. The lower court's decision is consistent with this Court's long-standing precedents holding that a law proscribing no specific standard of conduct—like the FCC's new indecency policy—is vague as applied to its challengers and cannot be applied to any set of facts. And the court necessarily looked to previously decided cases to discern what the FCC's current indecency policy actually is. On the merits, petitioners do not argue that the FCC's current indecency policy is sufficiently clear. Rather, they erroneously rely on FCC decisions predating the change in policy, but those decisions cannot give notice of when the FCC will find a fleeting expletive indecent, much less clarify the new policy.

ARGUMENT

I. THE FCC'S INDECENCY-ENFORCEMENT POLICY VIOLATES THE FIRST AMENDMENT.

Content-based restrictions on speech are presumptively unconstitutional, including restrictions on indecent material that comes into the home. *United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 814

(2000); *Reno*, 521 U.S. at 885; *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). These principles generally apply regardless of the specific medium of communication. *Playboy*, 529 U.S. at 814 (cable television); *Reno*, 521 U.S. at 874 (internet); *Sable*, 492 U.S. at 126 (telephone); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (mails); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (print); *United States* v. *12,200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973) (film). Indeed, this Court reiterated just last Term that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quotation omitted). The "most basic of these principles" is that "[a]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quotation omitted) (omission in original).

For the last several decades, however, broadcast media have been treated as second-class citizens—the one glaring exception to these otherwise uniform protections. The *Pacifica* Court permitted the FCC to censor broadcast speech falling within the constitutionally nebulous category of "indecency" based entirely on what the Court perceived at the time to be "unique" characteristics of the broadcast medium. The supposed uniqueness of broadcasting, however, was "dubious from [its] infancy," *Denver Area Educ. Telecomms. Constortium, Inc.* v. *FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., concurring and dissenting in part), and is simply not true today. *Pacifica* should

be overruled, and broadcasters should enjoy the same First Amendment protection enjoyed by every other medium of communication. But even if the Court does not overrule *Pacifica*, the FCC's current, *expanded* indecency policy violates the First Amendment under any standard. *Pacifica*'s outdated assumptions cannot support an expansion of the FCC's indecency-enforcement regime beyond the limits that served the nation for three decades until the FCC's recent change in policy. Finally, the scarcity doctrine of *Red Lion* cannot justify the FCC's indecency authority because that doctrine has never been the constitutional basis for censoring broadcast indecency, and the long-invalid assumptions on which it rests cannot validate the FCC's expanded policy.

A. This Court Should Overrule *Pacifica*.

Pacifica's foundations were built on sand. This Court upheld the FCC's indecency regime based on its perception, as of 1978, that broadcasting had "a uniquely pervasive presence in the lives of all Americans" and that it was "uniquely accessible to children." 438 U.S. at 748-49. Petitioners claim that nothing has changed in the ensuing decades—that broadcasting is still unique and that "broadcast speech [thus] may be subject to greater content-based restrictions (with respect to indecency and otherwise) than other forms of communication." Pet. Br. 42.

This simply defies reality. Obviously, the media marketplace has changed radically in ways that render both of *Pacifica*'s assumptions invalid. For every other medium, this Court has consistently struck down attempts to regulate indecency, see, *e.g.*, *Sable*, 492 U.S. at 131 (sex chat lines); *Reno*, 521 U.S. at 885 (Internet); *Playboy*, 529 U.S. at 826-27 (cable signal bleed), and there is simply nothing "'unique[]'" or special about broadcasting today that would justify

a different result here. *Fox*, 129 S. Ct. at 1820-22 (Thomas, J., concurring). This Court should now overrule *Pacifica*, and with it the FCC's authority to punish broadcast speech. See *id.* at 1821-22.

1. Broadcasting Is Not Uniquely Pervasive.

Petitioners argue that broadcasting is still "a pervasive medium of communications." Pet. Br. 44. That careful phrasing implicitly concedes, however, that broadcasting is no longer *uniquely* pervasive. Americans today, including children, spend more time engaged with cable and satellite television, the Internet, video games, and other media than they do with broadcast media. "Pervasiveness" no longer justifies subjecting broadcasting to greater suppression of indecency than other media.

At the outset, petitioners are forced to concede an inconvenient fact for their position: 87% of American households today subscribe to cable or satellite services,[4] and only a small percentage of Americans relies on the airwaves to receive television directly. Pet. Br. 44. As a result, the vast majority of Americans watch broadcast stations side by side with hundreds of non-broadcast channels that are not (and could not constitutionally be) bound by the FCC's indecency rules. This Court has already noted correctly that cable is just as "'pervasive . . . in the lives of all Americans'" as broadcasting. *Denver Area*, 518 U.S. at 745 (plurality opinion) (citation omitted). According to Nielsen data, the percentage of U.S. television households viewing primetime broadcast

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[4] That percentage has since risen to 89%. *Implementation of the Child Safe Viewing Act*, 24 FCC Rcd. 11,413, 11,418-19, ¶ 11 (2009).

network programming in 2008-09 was 25.6%, versus 36.3% for basic cable,[5] with most households receiving their broadcast programming via cable or satellite. Teenagers between the ages of 12 and 17 watched an average of approximately 2 hours (1:58:23) of cable a day (14 hours a week) compared to just 38 minutes (37:51) of broadcast programming (4.4 hours a week).[6]

The Internet—just an obscure Defense Department project in 1978—is now another extraordinarily pervasive medium of communication. Approximately 69% of U.S. households had an Internet connection in 2009, up 7% from 2007.[7] Internet users spend an average of 13 hours a week online[8]—a revolution in media usage since *Pacifica*. Consumers have many options today for watching video programming, (including broadcast programs) over the Internet, and that trend is accelerating rapidly.[9] Here again,

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[5] Bill Gorman, *Where Did The Primetime Broadcast TV Audience Go?*, TV by the Numbers (Apr. 12, 2010), http://tvbythenumbers.zap2it.com/2010/04/12/where-did-the-primetime-broadcast-tv-audience-go/47976/.

[6] *How Teens Use Media*, Nielsen, 3 (June 2009), *available at* http://blog.nielsen.com/nielsenwire/reports/nielsen_howteensusemedia_june09.pdf.

[7] U.S. Census Bureau, *Computer and Internet Use* (last revised June 7, 2011), http://www.census.gov/hhes/computer/. This data excludes those who access the Internet at work, school, or other public locations.

[8] *Internet Users Now Spending an Average of 13 Hours a Week Online*, Harris Interactive, Inc. (Dec. 23, 2009), *available at* http://www.harrisinteractive.com/vault/HI-Harris-Poll-Time-Spent-Online-2009-12-23.pdf.

[9] *The Cross-Platform Report, Quarter 1, 2011*, Nielsen, 3 (2011), *available at* http://nielsen.com/content/dam/corporate/us/

consumers can find broadcast programming on these Internet services one click away from a vast array of material that could not be subjected to the FCC's indecency policy. Video games were also largely nonexistent in 1978, but today millions of users immerse themselves in them for hours on end. *Brown*, 131 S. Ct. at 2748-49 (Alito, J., concurring). Given the "pervasiveness" of these alternative media, petitioners' claim (at 44) that broadcasting has "retained a dominant position in the media universe" has no credibility.

The Court's conception of "pervasiveness" was focused on the fact that a broadcast signal "confronts the citizen . . . in the privacy of the home." *Pacifica*, 438 U.S. at 748; see also *id.* at 759 (Powell, J., concurring). This notion at the heart of *Pacifica*—that broadcasting barges into the home uninvited like the unavoidable noise of a sound truck, cf. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (plurality opinion)—was never accurate. Cf. *Pacifica*, 438 U.S. at 748-49. Broadcast television cannot be viewed inside the home unless consumers take affirmative steps to receive those signals by setting up antennas and (if necessary) digital converter boxes and by purchasing televisions to view them. In this respect, there is no constitutionally relevant distinction between broadcasting and cable, satellite, or Internet services to which the public must subscribe. And it is especially unrealistic to argue today that the broadcast medium is *uniquely* pervasive in American homes—in the sense that the *Pacifica* Court used that term—when most American homes do not even operate an

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en/reports-downloads/2011-Reports/Nielsen-cross-platform-report-Q1-2011-reissued.pdf.

antenna that can receive over-the-air broadcast television.

Although events have rendered the Court's original finding of pervasiveness untenable, petitioners cling to the fact that there are still millions of people that watch programming that originates on a broadcast channel. Pet. Br. 44-46. But the popularity of that content does not make the broadcast *medium* unique. Mere marketplace acceptance of specific content cannot justify diminished First Amendment protection. Yet petitioners rely entirely on assertions about the continued popularity of broadcast content to advance precisely that frivolous argument.[10]

2. Broadcasting Is Not Uniquely Accessible To Children.

Petitioners' contention that broadcasting remains "'uniquely accessible to children'" is also incorrect. Pet. Br. 46 (quoting *Pacifica*, 438 U.S. at 749). Other forms of media today—including cable and satellite

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[10] Petitioners also cherry-pick their statistics. Their claim of 19.6 million over-the-air households, Pet. Br. 44, is in fact the highest, outlier estimate given in the *Video Competition Report. Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming*, 24 FCC Rcd. 542, 595, ¶ 108 (2009) ("*Video Competition Report*"). Nielsen estimated that in 2007 only 14% of households depended exclusively on broadcast, and the FCC's own Media Bureau arrived at an estimate in 2005 close to Nielsen's. *Id.* More recent estimates are even lower. *See supra*, n.4 (11% of television households rely exclusively on broadcasting). Petitioners' other statistics are also outdated: for example, they claim (relying on the 2005 Media Bureau Report, Pet. App. 80a) that half of satellite subscribers access broadcast channels over the air, Pet. Br. 45, but as of 2009, markets representing 97% of television households had local broadcast stations available via satellite. *Video Competition Report*, 24 FCC Rcd. at 584-85, ¶ 84.

television and the Internet—are equally accessible to children. See *supra*, 18-20.

In particular, it is no longer true that broadcasting cannot be "withheld from the young without restricting expression at its source." *Pacifica*, 438 U.S. at 749. Since 1978, "technology has provided innovative solutions to assist adults in screening their children from unsuitable programming—even when that programming appears on broadcast channels." *Fox*, 129 S. Ct. at 1822 n* (Thomas, J., concurring). Today, the V-Chip enables television viewers to block objectionable or "indecent" programming from entering their homes. FCC, *V-Chip: Viewing Television Responsibly*, http://transition.fcc.gov/vchip/ (updated July 8, 2003). As a result of congressional mandates and the nationwide conversion in 2009 to all-digital broadcasts, virtually every television in the nation receiving broadcast signals has access to a V-Chip. Pet. App. 16a.

Now that broadcasting routinely incorporates blocking technologies analogous to those in the cable and Internet contexts, broadcasting is no longer *uniquely* accessible to children. This Court has repeatedly invalidated bans on indecency when such blocking technologies are available, *Sable*, 492 U.S. 115; *Playboy*, 529 U.S. at 815; *Ashcroft* v. *ACLU*, 542 U.S. 656, 666-67 (2004), and the ubiquity of the V-Chip requires the same outcome here. Indeed, this Court has already held that restrictions on indecent speech on cable systems are unconstitutional where there are blocking technologies similar to the V-Chip. *Denver Area*, 518 U.S. at 755-56.

But the V-Chip is only the beginning; parents today have many other new technologies that allow them to control the programming to which their children are exposed. Since 1978, the widespread availability of

video-cassette recorders, DVD players, digital video recorders (DVRs), and video-on-demand services now gives parents far greater flexibility to record and prescreen material their children watch.[11] Parents have recently gained even more options with the proliferation of Internet services that deliver programming. These tools allow parents to create personal libraries of content they deem fit for their children, thereby allowing today's parents to act as a much more effective gatekeeper between their children and broadcast media than was even imaginable in 1978. The mere fact that these, either singly or together, are not 100 percent foolproof is of no constitutional relevance (cf. Pet. Br. 50), because this Court has made clear that blocking mechanisms need not be perfect to be a required substitute for a direct ban on content. See *Ashcroft*, 542 U.S. at 668.

Petitioners contend that broadcasting remains uniquely accessible to children because a significant percentage of children allegedly have a television set in their bedrooms. Pet. Br. 46-47. As petitioners concede, however, most American households do not operate an antenna for the reception of broadcast television, and television sets in children's bedrooms reflect *parental* choices about which media to make available to their families. Indeed, studies show that most parents impose household rules to govern children's access to broadcast television, just as they do for children's access to cable, the Internet, video

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[11] For example, 38.1% of television households have DVRs. *DVR Use in the U.S.*, Nielsen, 1 (Dec. 2010), *available at* http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/12/DVR-State-of-the-Media-Report.pdf.

games, and much more.[12] Given that parents now have numerous technological means to manage and supervise their children's exposure to broadcasting, the First Amendment requires this Court to trust that parents will use those tools to exercise their supervisory authority. *Playboy*, 529 U.S. at 824 ("a court should not presume parents, given full information, will fail to act"). The FCC's content-based ban backed up by draconian fines "just in case" all of these parental controls fail is unconstitutional, just as the Court has found in all other contexts. *Brown*, 131 S. Ct. at 2741 ("Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest.").

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Stare decisis is "not an inexorable command," *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991), especially in constitutional cases, see *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997). "[C]hanges in society"—like the technological upheaval in the media marketplace over the past 30 years—"dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez* v. *Hillary*, 474 U.S. 254, 266 (1986).

Petitioners invoke an alleged reliance on *Pacifica* as reason to keep it on life support, Pet. Br. 51-53, but this is not a case "involving property and contract rights, where reliance interests are involved," *Payne*, 501 U.S. at 828. Far from being embedded in "our national culture," Pet. Br. 52, *Pacifica* has become an

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[12] *See, e.g.*, Victoria Rideout & Elizabeth Hamel, *The Media Family: Electronic Media in the Lives of Infants, Toddlers, Preschoolers and Their Parents*, Kaiser Family Foundation, 20 (May 24, 2006), http://www.kff.org/entmedia/7500.cfm.

embarrassing outlier that confuses the public.[13] This Court has repeatedly declined to extend *Pacifica* to other contexts, see, *e.g.*, *Reno*, 521 U.S. at 867, leaving *Pacifica* "a positive detriment to coherence and consistency in the law," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989). Overruling *Pacifica* would not fundamentally change constitutional law; it would *restore* long-accepted First Amendment principles to a medium in which the allegedly unique reasons for an atextual exception no longer apply.

Petitioners worry that, freed of *Pacifica*, broadcasters would flood the airwaves with material just short of obscenity, Pet. Br. 51-52, but there is no evidence for this alarmist prediction, and no reason to believe market forces would allow it. Even during the late-night safe harbor—when the FCC's indecency rules do not apply—broadcasters have not aired potentially offensive words, much less material that is nearly obscene. Cf. *id.* at 34, 51-52. In any event, the First Amendment does not permit the possibility of offensive content to rationalize censorship of any other medium; broadcasting should be no different.

Accordingly, *Pacifica* should be overruled. Because the facts upon which *Pacifica* was predicated—the unique pervasiveness and unique accessibility of

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[13] The FCC's own statistics show that the public does not seem to understand *Pacifica*'s basic distinction between cable and broadcasting. *See* FCC, *Indecency Complaints and NALs: 1993-2006*, http://transition.fcc.gov/eb/oip/ComplStatChart.pdf (roughly one-quarter of all indecency complaints lodged in two most recent periods reported were against cable programs); *see also Various Complaints Against the Cable/Satellite Television Program "Nip/Tuck,"* 20 FCC Rcd. 4255 (Enforcement Bureau 2005) (rejecting indecency complaints against cable program).

broadcasting—have evaporated, that decision cannot stand. And without *Pacifica*'s "emphatically narrow" ruling based on those vanished facts, there is no constitutional defense for the FCC's indecency-enforcement regime.

B. Even Under *Pacifica*, The FCC's Expanded Indecency Regime Is Unconstitutional.

Even if the Court does not overrule *Pacifica*, it should recognize that *Pacifica*'s outdated assumptions cannot support the FCC's *expansion* of its indecency regime beyond the narrow confines of *Pacifica* itself. See, *e.g.*, *Fox*, 129 S. Ct. at 1828 n.5 (Stevens, J., dissenting) ("the changes in technology . . . certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen"). While this Court has not explicitly "held that *Pacifica* represented the outer limits of permissible regulation," *id.* at 1815, in light of today's media marketplace, it must do so now.[14]

The FCC's current enforcement policy, which subjects even isolated expletives or brief, scripted images to multi-million-dollar fines, cannot survive First Amendment scrutiny under any standard. The government's restriction of broadcast speech must at least be narrowly tailored to serve a substantial governmental interest. See *FCC* v. *League of Women Voters*, 468 U.S. 364, 380 (1984); Pet. App. 14a. The FCC's new indecency policy fails both requirements:

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[14] Contrary to petitioners' implication, Pet. Br. 37, this Court emphasized in *Fox* that its decision upholding the orders at issue on APA grounds "says nothing about constitutionality" or whether *Pacifica* "'endorsed'" the FCC's current policy, *Fox*, 129 S. Ct. at 1818 n.7 (plurality opinion).

(1) There is no substantial governmental interest in shielding children from momentary exposure to isolated words or images as opposed to content equivalent to the Carlin monologue; and even if there were, (2) the FCC's new policy is in no way tailored to advance that interest because it is wildly under- and over-inclusive.

1. The FCC's Interest Is Not Substantial.

The FCC has a governmental interest in protecting children from "indecency" only where the material at issue is egregiously offensive and can plausibly threaten the "physical and psychological well-being of minors." *Sable*, 492 U.S. at 126. In *Pacifica*, Justice Powell stressed in his concurrence that the government's interest stems from a child's inability to protect himself from material that would be "shocking to most adults" and that "may have a deeper and more lasting negative effect on a child." *Pacifica*, 438 U.S. at 757-58 (Powell, J., concurring). Similarly, this Court's other cases involving restrictions on "indecency" focused on graphic sexual material that was overtly pornographic. See *Sable*, 492 U.S. at 117-18 (dial-a-porn); *Denver Area*, 518 U.S. at 752 (plurality opinion) (statute aiming at "pictures of oral sex, bestiality, and rape"); *Playboy*, 529 U.S. at 811 ("'sexually explicit adult programming'" that "many adults themselves would find . . . highly offensive").

Petitioners nonetheless assert a general interest in protecting children from offensive speech, Pet. Br. 41, ignoring the fundamental difference between protecting children from graphically indecent content and protecting children from *any* merely momentary

exposure to a word or image.[15] In declining to decide that "an occasional expletive . . . would justify any sanction," *id.* at 750, *Pacifica* specifically recognized the distinction between such momentary exposures and Carlin's language, which had been chosen for its offensive quality and "repeated over and over as a sort of verbal shock treatment." *Id.* at 757 (Powell, J., concurring)). Even though "Congress has made the determination that indecent material is harmful to children," *Fox*, 129 S. Ct. at 1813, this Court has always understood the government's interest under the First Amendment to be limited to protecting children from shocking material like the Carlin routine or content that is obscene as to minors. *Ginsberg* v. *New York*, 390 U.S. 629, 634-35 (1968). The *only* case that petitioners cite (at 41) to support some broader governmental interest in shielding children from offensive language is *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), but that turned on the "'special characteristics of the school environment,'" *Morse* v. *Frederick*, 551 U.S. 393, 405 (2007). If the *child* in that case had given the same vulgar speech "outside the school context, it would have been protected." *Id.* (citing *Cohen* v. *California*, 403 U.S. 15 (1975)).

Contrary to petitioners' unsupported assertion (Pet. Br. 37), therefore, this Court has never found a governmental interest in restricting speech among adults merely because a child might be momentarily

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[15] This distinction turns not on empirical evidence but on the qualitative difference in the nature of the material and its corresponding effects on children. *Cf. Fox*, 129 S. Ct. at 1813.

exposed to a potentially offensive *word*.[16] Even if "mimic[king]" an adult's use of an offensive word might "suffice[]" as a justification for the FCC's change in policy under the APA, *Fox*, 129 S. Ct. at 1813, the mere fact that children may repeat an offensive word they hear an adult say is not a "harm" that could justify restrictions on protected speech under the First Amendment. See, *e.g.*, *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 213-14 (1975). Preventing such "miniscule real-world effects" that are "indistinguishable from effects produced by other media" is not a significant governmental interest. *Brown*, 131 S. Ct. at 2739 & n.7.

This Court held in *Cohen* v. *California* that "[s]urely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." 403 U.S. at 25. Indeed, "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another man's lyric." *Id.* Accordingly, use of such words must be governed by "the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Id.* at 24.

The same is true of momentary exposure to nudity that is not graphically sexual. In ruling on an ordinance banning a drive-in movie theater from showing films containing nudity when the screen was visible from a public street or place, the Court distinguished between films containing "sexually explicit nudity" and a more "sweeping[]" ban on films

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[16] *Cf. Golden Globes Order*, 19 FCC Rcd. at 4979, ¶ 9 (citing the need to avoid "exposing children to indecent language").

"containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness." *Erznoznik*, 422 U.S. at 213. Indeed, this Court addressed that distinction expressly in terms of the impact on children, holding that such a "broad restriction" on nudity could not "be justified by any . . . governmental interest pertaining to minors." *Id.*

The FCC's current enforcement regime is not limited to material equivalent to the "verbal shock treatment" in *Pacifica* but instead punishes protected speech based solely on the FCC's impressions of artistic necessity. This Court has expressly held, however, that the government has no legitimate interest in regulating "matters of taste and style" precisely because "government officials *cannot* make principled distinctions in this area." *Cohen*, 403 U.S. at 25 (emphasis added). Permitting the FCC to punish speech purely on grounds of vulgarity or bad taste would inevitably restrict substantive debate in the guise of maintaining decorum. *Id.* at 26 (refusing to "indulge the facile assumption that one can forbid particular words without . . . suppressing ideas in the process"). A healthy freedom of speech, by its nature, will periodically bring forth "verbal tumult, discord, and even offensive utterance" that may offend our "esthetic, if not our political and moral, sensibilities." *Id.* at 24-25; *Erznoznik*, 422 U.S. at 210; see also *Playboy*, 529 U.S. at 818, 826. The government cannot, however, assert an interest in protecting those *sensibilities*, or in protecting children from even momentary exposure to that "verbal cacophony" (*Cohen*, 403 U.S. at 25), without compromising the guarantees that are at the core of the First Amendment. See *Pacifica*, 438 U.S. at 759-60 (Powell, J., concurring).

This difficulty is inherent in the FCC's current, expanded policy, which assesses individual programs based on explicitly content-related considerations such as whether the expletive or image was necessary to the story or for the understanding of a socially valuable viewpoint.[17] In effect, the FCC has set itself up as a kind of "super-editor" of broadcast programming content—wielding not only a red pen but multi-million-dollar fines if a broadcaster has guessed incorrectly about the social value or artistic necessity of a particular expletive or image. The FCC has no legitimate interest, however, in making assessments about whether offensive words or images are necessary to the "power and immediacy" of an artistic work. *Cohen*, 403 U.S. at 25; *Playboy*, 529 U.S. at 818 ("esthetic and moral judgments about art and literature" are "for the individual to make, not for the Government to decree, even with the mandate or approval of a majority"). Similarly, the FCC has no constitutional expertise or legitimate interest in distinguishing what is "news" from what is not;

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[17] *Compare Complaints Against Various Television Licensees Regarding Their Broad. On Nov. 11, 2004 of the ABC's Television Networks Presentation of the Film Saving Private Ryan*, 20 FCC Rcd. 4507, 4512-13, ¶ 14 (2005) ("*Saving Private Ryan*") (deleting or altering language "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film"), *with Golden Globe Order*, 19 FCC Rcd. at 4979, ¶ 9, *and* J.A. 118 (not "essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance"); *compare also id. at* 90 ("substitution of other language would [not] have materially altered the nature of the work"), *with id.* at 188 (Adelstein, concurring and dissenting in part) (expletives in "The Blues" necessary "[t]o accurately reflect their viewpoint and emotions about blues music [and] if prohibited, would undercut . . . the subject of the documentary").

indeed, this Court has "long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try." *Brown*, 131 S. Ct. at 2733. Such judgments are especially damaging for live coverage of newsworthy events—like the awards shows at issue here—where "'there is no opportunity for journalistic editing.'" *Petition for Clarification or Reconsideration of a Citizens' Complaint Against Pacifica Found.*, 59 F.C.C.2d 892, 893, ¶ 4 n.1 (1976); cf. Pet. Br. 37.

In short, the FCC's current enforcement policy does not further any legitimate governmental interest. See *Pacifica*, 438 U.S. at 761 (Powell, J., concurring) (courts cannot assess "which speech protected by the First Amendment is most 'valuable'"); *E. Educ. Radio*, 24 F.C.C.2d at 413, ¶ 13. The FCC's authority extends no further than censoring the kind of repetitive "shock treatment" typified by the Carlin monologue, and any attempt to expand its policy beyond the limits of *Pacifica* is unconstitutional. See also *Fox*, 129 S. Ct. at 1825, 1826-28 & n.5 (Stevens, J., dissenting).

2. The FCC's Current Enforcement Policy Is Not Narrowly Tailored.

Even if the FCC's interest here were substantial, its current enforcement policy does not meaningfully advance that interest, and it is certainly not narrowly tailored to do so. When the government acts to restrict speech, the First Amendment requires that the measures at issue "in fact alleviate [the identified] harms in a direct and material way." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994) (plurality opinion); *CBS, Inc.* v. *DNC*, 412 U.S. 94, 127 (1973). Moreover, "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote" the governmental interest.

Playboy, 529 U.S. at 813; *League of Women Voters*, 468 U.S. at 380.

The FCC's current policy is fatally under-inclusive. Singling out broadcasters for indecency enforcement in an attempt to shield children from momentary exposure to indecent words or images is not just ill-tailored to achieve that asserted interest; it is quixotic. Children today are exposed to potentially offensive words and images from a vast array of sources other than broadcast television. They can encounter such words or images on non-broadcast channels; in books and magazines; on the Internet, DVDs, or video games; on playgrounds, at sporting events, or simply upon overhearing an adult conversation. Indeed, this Court has already acknowledged that there is essentially no difference between cable and broadcast television when it comes to the effects of television on children. See *Denver Area*, 518 U.S. at 748 (plurality opinion). Moreover, the FCC's policy is under-inclusive even as to broadcasting, because it allows certain offensive words when, in the FCC's view, they are artistically necessary or are in an FCC-defined "news" show.

The FCC's current enforcement policy thus leaves children susceptible to momentary exposure to potentially offensive content from a multitude of sources. The FCC's current policy is "wildly under-inclusive," and such underinclusiveness "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 131 S. Ct. at 2740. In the current media environment, it is fanciful to believe that aggressive indecency enforcement solely against broadcasters will be effective in preventing children from exposure to potentially offensive words or images, and that

"alone [is] enough to defeat it." *Id.*; see also *CBS, Inc.*, 412 U.S. at 127 ("sacrifice [of] First Amendment protections for so speculative a gain is not warranted").

The policy is also grossly overinclusive. Fewer than one-third of American television households have children under 18 years old.[18] Even in the minority of households with children, not all children who hear an offensive word "have parents who *care* whether" they hear those words. *Brown*, 131 S. Ct. at 2741. Thus, although the FCC's current policy "may indeed be in support of what some parents . . . actually want, its entire effect is only in support of what [the FCC] thinks parents *ought* to want." *Id.* Children will inevitably be exposed to potentially offensive words before they reach adulthood, and the First Amendment requires the government to trust parents to teach their children about those words. The FCC's content ban is "not the narrow tailoring to 'assisting parents' that restriction of First Amendment rights requires." *Id.*

Moreover, as explained above, there exist today numerous parental controls and guidance that did not exist in 1978, see *supra*, 22-24, and the First Amendment requires the FCC to rely on those parental controls. "[E]ven where speech is indecent and enters the home, the objective of shielding

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[18] *Compare 114.9 Million U.S. Television Homes Estimated for 2009-2010 Season*, Nielsenwire (Aug. 28, 2009), http://blog.nielsen.com/nielsenwire/media_entertainment/1149-million-us-television-homes-estimated-for-2009-2010-season/, *with* U.S. Census Bureau, *America's Families and Living Arrangements: 2010*, tbl.F1 (Nov. 2011), *available at* http://www.census.gov/population/www/socdemo/hh-am/cps2010.html (35.2 million family households with children under age 18).

children does not suffice to support a blanket ban if the protection[s] can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 814. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government *must* use it." *Id.* at 815 (emphasis added); see *Turner*, 512 U.S. at 641-42; *Pacifica*, 438 U.S. at 748; see also *League of Women Voters*, 468 U.S. at 395, 398-99. Blocking technologies allow the government "to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Playboy*, 529 U.S. at 815. Therefore, the V-Chip and other technological tools for controlling children's access to broadcasting render the FCC's content-based enforcement unconstitutional. *Id.*

C. Petitioners' Reliance On The Scarcity Doctrine Is Misplaced.

In what amounts to a hail-Mary attempt to salvage its indecency-enforcement regime, petitioners now try to re-conceptualize the FCC's regulatory authority over indecency as stemming from the scarcity doctrine. Pet. Br. 42-44, 47-49, 51-53. They contend that broadcasters receive valuable benefits from the use of scarce spectrum and, therefore, that the FCC may "constitutionally require licensees to accept content-based restrictions that could not be imposed on other communications media." *Id.* at 44, 53. Essentially, petitioners now believe that the FCC's control of the licensing regime represents a kind of "grand bargain" with broadcasters with an unconstitutional condition at its core—a near-blank check for the FCC to pursue a broad variety of content-related goals that it concedes would blatantly violate the First Amendment in any other context. This cannot be. See *Perry* v. *Sindermann*, 408 U.S. 593, 597

(1972). But these contentions are also meritless on their own terms.

First, the scarcity doctrine has never been the basis for indecency enforcement. In *Pacifica*, this Court specifically stated that "two" factors "have relevance" to indecency restrictions: unique pervasiveness and accessibility to children, not the scarcity doctrine. *Pacifica*, 438 U.S. at 748-49; see *id.* at 770 n.4 (Brennan, J., dissenting). The FCC itself expressly disavowed the scarcity doctrine as a basis for indecency restrictions more than 20 years ago,[19] and it has only belatedly rediscovered this rationale in the current litigation. Moreover, the scarcity doctrine has historically been used to justify regulatory measures (like the Fairness Doctrine) that forced broadcasters to air *additional* speech, in an attempt to compensate for the perceived scarcity of broadcast licenses. This Court has never regarded the scarcity doctrine as a ground for *restricting* broadcasters' own programming or views. See *Red Lion*, 395 U.S. at 396 ("refusal to permit the broadcaster to carry a particular program or to publish his own views" or "government censorship of a particular program" would "raise more serious First Amendment issues"); *League of Women Voters*, 468 U.S. at 379.

Second, the scarcity doctrine has no continuing validity, if it ever did. Over the past three decades, the doctrine has been subjected to withering criticism

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[19] *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705, 2707, ¶ 7 n.7 ("[W]e no longer consider the argument of spectrum scarcity to provide a sufficient basis for [indecency] regulation."), *aff'd on recon.* 3 FCC Rcd. 930, 936 ¶ 3 n.11 (1987) (acknowledging express rejection of scarcity rationale).

from all quarters.[20] As Justice Thomas noted in *Fox*, 129 S. Ct. at 1821, the scarcity doctrine has always been conceptually nonsensical. "[A]ll economic goods are scarce," and "[s]ince scarcity is a universal fact, it can hardly explain regulation in one context and not another." *Telecomms. Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 506-09 (D.C. Cir. 1986). Moreover, since *Red Lion* was decided in 1969, "dramatic technological advances have eviscerated the factual assumptions underlying" that decision. *Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring). There are more than twice as many over-the-air broadcast stations than there were 40 years ago, *id.*, and as explained above, the number of additional media outlets has exploded during that time with the development of cable and satellite television and the Internet. This Court recognized as early as 1973 that the scarcity doctrine had a limited shelf life. *CBS, Inc.*, 412 U.S. at 158 n.8 (Douglas, J., concurring); see also *League of Women Voters*, 468 U.S. at 376 n.11. If anything, this Court should inter the scarcity doctrine once and for all, but the doctrine certainly cannot be the basis for *expanding* the FCC's authority to censor broadcast speech.

Third, petitioners' suggestion that sweeping restrictions on broadcasters' content is part of an age-old

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[20] *Turner*, 512 U.S. at 638 & n.5; *Denver Area*, 518 U.S. at 813 (Thomas, J., concurring and dissenting in part); *Time Warner Entm't Co.* v. *FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (en banc) (per curiam) (Williams, J., joined by Edwards, C.J., Silberman, Ginsburg, and Sentelle, JJ., dissenting from denial of rehearing *en banc*); *ACT* v. *FCC*, 58 F.3d 654, 674-75 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting); *Ark. AFL-CIO* v. *FCC*, 11 F.3d 1430, 1442-43 (8th Cir. 1993) (Arnold, R., C.J., concurring).

"bargain" inherent in a broadcast license is incorrect. Section 1464 has always been a criminal prohibition that applies generally to every member of the public—not just licensees. 18 U.S.C. § 1464; see Radio Act of 1927, ch. 169, § 29, 44 Stat. at 1172-73. Even the FCC's civil enforcement power extends to non-licensees. 47 U.S.C. § 503(b)(5) (authorizing forfeitures against non-licensees). Moreover, neither broadcasters nor the public has any vested "understanding" or "expectations" concerning the FCC's *current*, expanded enforcement policy, which represents a sharp departure from the FCC's longstanding practice of restraint and has no history prior to the orders at issue here. Cf. Pet. Br. 51-53.

Petitioners' remaining arguments demonstrate just how dangerous and illogical their defense of content bans based on the scarcity doctrine has become. They paradoxically contend that the very explosion of alternative speech platforms makes the FCC's expanded suppression of content *more* acceptable, because this proliferation of outlets allegedly reduces the "burden" on speech and justifies treating broadcasting as a "safe haven" for parents. Pet. Br. 47-49. This argument would be untenable if advanced in any other First Amendment context; surely the government cannot regulate foul language in books simply because would-be writers and readers have alternative options in other media. And the supposed "scarcity" of broadcasting cannot logically justify measures that are concededly intended to *single out* broadcasters as a "safe haven" from among an abundance of substitutes, because the very

existence of those substitutes negates the assumption of scarcity.[21]

If the federal government wants to maintain a "safe haven" of broadcast material, then it should create a state-sponsored broadcast station and broadcast only those messages and images that it believes are "safe." The First Amendment does not limit government speech, but it certainly limits what the government can compel a private speaker to say or not to say.

II. THE FCC'S NEW INDECENCY-ENFORCEMENT POLICY IS UNCONSTITUTIONALLY VAGUE.

The Second Circuit correctly held that the FCC's new indecency-enforcement policy is unconstitutionally vague. A law whose "prohibitions are not clearly defined" offends "basic principle[s] of due process" and is "void for vagueness." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Moreover, "stricter standards" of clarity apply to laws that have a "potentially inhibiting effect on speech" protected by the First Amendment, *Smith* v. *California*, 361 U.S. 147, 151 (1959); see *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974), because such a law "operates to inhibit the exercise of [those] freedoms," which "inevitably lead[s] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked," *Grayned*, 408 U.S. at 109 (internal quotation marks omitted) (first alteration and omission in original).

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[21] Petitioners claim (at 48 & n.6) that broadcast-indecency regulation does not burden the broadcast networks because they are all affiliated with cable channels. Even if that were relevant, most broadcast licensees are not affiliated with non-broadcast channels.

Here, neither the statute nor the FCC's definition can provide the necessary clarity. Section 1464 itself merely prohibits the utterance of "indecent" language by means of radio communication. 18 U.S.C. § 1464. This Court has held that a bare prohibition against "indecency" without more is the archetype of an impermissibly vague standard because it calls for "'wholly subjective judgments.'" *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) ("*HLP*") (quoting *United States* v. *Williams*, 553 U.S. 285, 306 (2008)).

Similarly, the FCC's policy defines "indecency" as language that "describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium," Pet. App. 45a, but this Court struck down as unconstitutionally vague a "definition of indecency [that] was almost identical to the Commission's" definition in *Reno*.[22] *Id.* at 21a; *Reno*, 521 U.S. at 870-74 (definition was vague because it did not provide any discernible line between permissible and impermissible conduct). As the Second Circuit correctly observed, "language that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another." Pet. App. 21a. *Reno*'s holding controls here, and *Pacifica* is not to the contrary. Cf. Pet. Br. 33. In *Pacifica*, the Court did not address a vagueness challenge, as the principal case upon which petitioners rely concedes. *ACT* v. *FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (Ginsburg,

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[22] The statute at issue in *Reno* defined indecency as any "'communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.'" 521 U.S. at 860 (quoting 47 U.S.C. § 223(d)).

J.) ("Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague").[23]

Because neither § 1464 nor the FCC's generic definition of "indecency" can provide the clarity required by the Fifth Amendment, the Second Circuit correctly recognized that the FCC's new indecency enforcement policy can survive a vagueness challenge only if the agency provided sufficient clarity through its "further elaborat[ion]" in other enforcement orders. Pet. App. 21a. The court rightly concluded that it has not.

A law can be unconstitutionally vague "for either of two independent reasons." *Hill* v. *Colorado*, 530 U.S. 703, 732 (2000). A law is impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement," *id.*; *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983), *or* if it "'fails to give a person of ordinary intelligence fair notice'" of what is prohibited, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *United States* v. *Hariss*, 347 U.S. 612, 617 (1954)). The Second Circuit correctly held that the current policy fails on both counts.

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[23] Petitioners have previously argued that *Reno* expressly distinguished *Pacifica*. As the Second Circuit correctly recognized, however, *Reno* distinguished *Pacifica* only "with respect to 'the level of First Amendment scrutiny that should be applied to this medium,' not to its analysis of whether the statute was unconstitutionally vague." Pet. App. 21a (quoting *Reno*, 521 U.S. at 870).

A. The FCC's New Indecency Policy Authorizes Arbitrary And Discriminatory Enforcement.

First, the Second Circuit held that the current policy is unconstitutionally vague because the "FCC's indiscernible standards" permit "discriminatory" enforcement. Pet. App. 28a. Although petitioners challenge the Second Circuit's determination that the FCC's new policy fails to provide fair notice to broadcasters, they never address the court's discriminatory-enforcement holding. This Court can affirm the judgment below solely on this basis.

A law is impermissibly vague if it authorizes or encourages arbitrary and discriminatory enforcement. *Williams*, 553 U.S. at 304; *Hill*, 530 U.S. at 732; *Lawson*, 461 U.S. at 357-58; *City of Chi.* v. *Morales*, 527 U.S. 41, 60 (1999). Under this "more important aspect of the vagueness doctrine," a law is impermissible if it fails to establish minimal guidelines to govern enforcement of the law. *Lawson*, 461 U.S. at 357-58 (citing *Goguen*, 415 U.S. at 574). Without minimal guidelines, the law "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* at 358 (alteration in original) (quoting *Goguen*, 415 U.S. at 575); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). Importantly, "[t]he question is not whether discriminatory enforcement occurred *here*, . . . but whether the [law] is so imprecise that discriminatory enforcement is a real possibility." *Gentile* v. *State Bar*, 501 U.S. 1030, 1051 (1991) (emphasis added).

1. The Second Circuit correctly concluded that the FCC's new enforcement policy creates precisely this real possibility by failing to impose any minimal guidelines that limit the FCC's ability to pursue its

own "'predilections'" in each case. *Lawson*, 461 U.S. at 358. The FCC has at its disposal many thousands of viewer complaints—the vast majority of which are computer generated by advocacy groups and then forwarded to the FCC by individuals—from which to target broadcasts of its choice. See, *e.g.*, J.A. 298-417. Nothing guides the FCC's selection of which complaints to pursue.

Even worse, the FCC's elaboration of its new policy does not limit its ability to reach any outcome it pleases. According to the FCC, the "'patent offensiveness'" of broadcast material is judged according to "contemporary community standards for the broadcast medium." Pet. App. 54a, 60a. In making this assessment, the FCC insists that it will "rely on the Commission's 'collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens." *Id.* at 59a (quoting *Infinity Radio License*, 19 FCC Rcd. at 5026, ¶ 12). But because the supposed standard rests on the FCC's internal "experience and knowledge," *id.*, it means whatever a majority of the FCC says it means. Moreover, because these mercurial "standards" vary based on the FCC's "constant interaction" with others, the FCC can distinguish inconsistent results using allegedly changed circumstances. The FCC's discretion in applying these standards is unbounded and thus unconstitutional. See *Giaccio*, 382 U.S. at 403.

2. The same is true of the FCC's "patent offensiveness" inquiry, which the FCC previously said relies on three principal factors: (i) the material's explicitness or graphic nature, (ii) the extent to which it is repeated or dwelled upon, and (iii) the extent to which it panders, titillates, or shocks. Pet. App. 46a.

Under the FCC's prior indecency policy, this inquiry had at least one minimal guideline—the offensive word or depiction had to be dwelled upon or repeated. Under the new policy, however, that guideline can be dispensed with at the FCC's discretion. Now, the FCC has said, "one or two of the factors may outweigh the others" to "render[] the broadcast material patently offensive." *Id.* Moreover, the FCC will "weigh and balance" the factors for each broadcast "because '[e]ach indecency case presents its own particular mix of these, and *possibly other*, factors.'" *Id.* (quoting *Indecency Policy Statement*, 16 FCC Rcd. at 8003, ¶ 10) (emphasis added).

In other words, the FCC may now decide indecency complaints based on one, some, or all of the factors it has previously announced, or it can decide cases on "other" factors it chooses to invoke at its whim. Pet. App. 46a. And the factors it has emphasized (the explicitness or graphic nature of the material and whether it panders, titillates, or shocks) are entirely subjective judgments that the agency has never defined or clarified. *Id.* at 24a; see, *e.g.*, *Complaints by Parents Television Council Against Various Broad. Licensees Regarding their Airing of Allegedly Indecent Material*, 20 FCC Rcd. 1931, 1938, ¶ 8 (2005) (merely stating that the factors have not been met). Moreover, the FCC claims even greater discretion because it will judge not only the presence but the relative "weigh[t] and balance" of these subjective factors in each individual case. Pet. App. 46a. Ultimately, the FCC's patent offensiveness framework gives the FCC unlimited license to justify any result. See *Lawson*, 461 U.S. at 358 (unconstitutional law "vests virtually complete discretion in the hands of the police"). The Due Process Clause and First

Amendment forbid that unbridled discretion to censor speech.

3. The FCC's decisions confirm the unbounded nature of its discretion. As the Second Circuit explained, the FCC's "disparate treatment of [the film] 'Saving Private Ryan' and the documentary, 'the Blues,'" provides one example of the "risk" that the FCC is engaged in "subjective, content-based decision-making." Pet. App. 29a. In "Saving Private Ryan," the FCC concluded that "the words 'fuck' and 'shit' were integral to the 'realism and immediacy of the film experience for viewers,'" *id.*, and, therefore, were not "shock[ing]," *Saving Private Ryan*, 20 FCC Rcd. at 4512, ¶ 13. But the FCC found these same words indecent in "The Blues," a documentary by Martin Scorsese "'containing interviews of blues performers and a record producer'" intended "'to provide a window into [the world of the individuals being interviewed] with their own words.'" J.A. 85-86 (alteration in original). The FCC found these words in "The Blues" "shocking," expressly "disagree[ing] that the use of such language was necessary to express any particular viewpoint." *Id.* at 88. Commissioner Adelstein dissented on this ground, remarking that "[i]t is clear from a common sense viewing of the program that coarse language is part of the culture of the individuals being portrayed." *Id.* at 188. These conflicting views highlight the purely subjective nature of the FCC's new indecency policy, and the FCC's use of the same factors to reach conflicting results demonstrates how malleable that policy truly is.

The FCC's amorphous "artistic necessity" and "*bona fide* news" exceptions also provide unlimited discretion in practice. For the artistic necessity exception, the FCC has said that it will exempt "material

[that] has any social, scientific or artistic value" or is integral to the broadcast. *Saving Private Ryan*, 20 FCC Rcd. at 4511-12, ¶ 11. But nowhere has the FCC provided any indication of when or how this exception applies other than at the FCC's caprice. In *Saving Private Ryan*, the FCC concluded that the repeated use of potentially offensive words was integral to that fictional war movie. Yet, the FCC deemed the repeated use of similar language not necessary to the movie "The Pursuit of D.B. Cooper," a fictional account of an infamous 1971 skyjacker. Compare *id.* at 4512-13, ¶ 14, with J.A. 94-97 & 97 n.142. In the latter ruling, the FCC perfunctorily explained that "[u]nlike *Saving Private Ryan*, we find that the vulgar material here could have been edited without materially altering the broadcast." J.A. at 97 n.142. The only apparent basis for these different results is the FCC's subjective *ipse dixit*.

Similarly, the FCC professes that it will act cautiously in evaluating news programming, but it has also denied that there is an "outright news exemption." Pet. App. 100a. As the Second Circuit noted, the FCC first found the use of the word "bullshitter" during an interview on "The Early Show" to be indecent because the program was a news interview; it then reversed itself and found that it was not indecent because it was a news interview. Compare J.A. 120-22, with Pet App. 100a-101a. Using this rationale, the FCC is free to exempt or penalize public affairs programs as it sees fit. The FCC's "commitment" to news programming, devoid of any objective standard, permits the FCC to accomplish any end it chooses.

Nor is the FCC's ability to manipulate the patent offensiveness factors limited to language. The FCC has determined that a broadcast of the film

"Schindler's List," including the depiction of full frontal male nudity, was disturbing but not "shocking," and thus not patently offensive. *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838, 1840, 1842, ¶¶ 6, 13 (2000); Pet. App. 145a. In contrast, the FCC concluded that the "NYPD Blue" episode at issue—which contained the brief, non-sexualized shot of an actress's naked buttocks—was "shocking" and thus patently offensive. Pet. App. 143a-144a. Once again, nothing cabins the FCC's discretion except its subjective opinion of what is shocking.

Petitioners do not even attempt to rebut the Second Circuit's holding that the FCC's new indecency policy creates an arbitrary and discriminatory enforcement regime, and this Court can and should affirm on that ground alone.

B. The FCC's New Indecency Policy Fails To Provide Fair Notice Of What Is Prohibited.

On the independent question whether the FCC's policy provides fair notice, the Second Circuit correctly concluded that the policy is unconstitutional. A law provides the required "'fair notice,'" *Papachristou*, 405 U.S. at 162, only when it is "sufficiently explicit to inform those who are subject to it what conduct on their part" is proscribed, *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Thus, a law is impermissibly vague when people cannot reasonably predict "the line between the allowable and the forbidden." *Winters* v. *New York*, 333 U.S. 507, 519 (1948); *Goguen*, 415 U.S. at 574. And laws that ultimately call for "'wholly subjective judgments'" are quintessentially vague. *HLP*, 130 S. Ct. at 2720 (quoting *Williams*, 553 U.S. at 306).

The FCC's new, expanded indecency-enforcement policy does not give broadcasters fair notice of which broadcasts will be found indecent because that policy lacks any objective, discernible standards. Rather than add clarity, the FCC's further elaboration on "contemporary standards" and its new framework for deciding what is "patently offensive" have made these standards even vaguer.

In *Reno*, this Court explained that contemporary community standards can cure the vagueness inherent in an indecency regime only when they are based on objective criteria, such as specifically defined state laws (as used in the *Miller* obscenity standard). *Reno*, 521 U.S. at 873. The FCC's contemporary community standards are not based on such objective criteria. Rather, they "rely on the Commission's 'collective experience and knowledge.'" Pet. App. 59a (quoting *Infinity Radio License*, 19 FCC Rcd. at 5026, ¶ 12). The FCC has not explained what this inherently subjective standard means nor defined it according to any ascertainable or objective legal standard. Broadcasters must somehow get inside the heads of ever-changing FCC Commissioners and personnel; to paraphrase Justice Stewart, broadcasters must know it when the FCC sees it. No amount of sophistication or familiarity with industry regulations, Pet. Br. 34, enables broadcasters to predict in advance the FCC's post hoc divination of whether the "community" was offended.

Similarly, the FCC's elaboration of the "patent offensiveness" standard adds to the vagueness of the FCC's new indecency-enforcement policy. Broadcasters cannot know whether one, some, or all of the FCC's articulated factors, or some "other" unstated factor, will result in an indecency finding, or how the FCC will weigh these factors. Pet. App. 46a.

Whether particular material is explicit or graphic, and whether it panders, titillates, or shocks, also calls for an inherently subjective judgment or opinion; there is no way for broadcasters to anticipate how any two people, much less the FCC, will judge these factors. *Cohen*, 403 U.S. at 25 ("one man's vulgarity is another's lyric"); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971) ("Conduct that annoys some people does not annoy others."). Moreover, the FCC's "artistic necessity" and "'*bona fide* news'" exceptions make the indecency analysis even more indeterminate. See Pet. App. 25a-26a. Because these factors call for "wholly subjective judgments," they are quintessentially vague and thus do not provide fair notice. *Williams*, 553 U.S. at 306.[24]

As the Second Circuit found, the current policy's combination of unpredictable standards and eight-figure fines is chilling speech by forcing broadcasters to "steer far wider of the unlawful zone." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); see Pet. App. 31a (the vagueness of the FCC's policy combined with the "massive fines or possibl[e] . . . loss of [a] license[]" have "chilled protected speech"). Among many programs, broadcasters have declined to air award-winning documentaries about September 11th and live coverage of memorials for soldiers killed in Afghanistan because of the adult language that may

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[24] A "scienter requirement may mitigate a law's vagueness," *Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), but petitioners have consistently maintained over broadcasters' objections that enforcement of § 1464 requires something less than scienter. If the Court does not affirm the Second Circuit's judgment, a remand is necessary to address Fox's independent scienter arguments, which the Second Circuit did not reach.

be used and the lack of clarity in the FCC's policy. Pet. App. 31a, 33a; J.A. 278. The vagaries of the FCC's enforcement regime have also led broadcasters to decline to air certain political speech, Pet. App. 33a, as well as literature readings and programs dealing with sexual health, *id.* at 31a, 33a-34a. As the Second Circuit observed, many of these chilled programs deal "with some of the most important and universal themes in art and literature." *Id.* at 34a.[25]

The vagueness of the FCC's new indecency regime is particularly problematic for live broadcasts because unscripted news, entertainment, or sports programs may unexpectedly include potentially offensive words. See Pet. App. 33a n.12 (describing FCC investigation into live coverage of sporting event). In response to the problems created by the FCC's policy, "local broadcasters are responding by altering—or halting altogether—the one asset that makes local stations so valuable to their communities: live TV." Allison Romano, *Reporting Live, Very Carefully*, Broadcasting & Cable (Jul. 3, 2005), http://www.broadcastingcable.com/article/CA623019.html; J.A. 288-89.

One alternative available to broadcasters is delay technology. But this compromises the primary reason many viewers watch live programming—to view live events. This is especially challenging for broadcasters that must compete for viewers who desire live programming (like sporting events) with

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[25] The breadth of the chill caused by the FCC's policy refutes petitioners' dismissive claim that the vagueness of this policy is permissible because it will only affect broadcasts "close to the indecency line" and "far removed from typical broadcast fare." Pet. Br. 35.

other outlets not subject to the FCC's vague indecency policy (*e.g.*, cable and the Internet). See, *e.g.*, J.A. 288-89. And the burdens of delay technology are heaviest for smaller, local broadcasters that have "special importance." *Fox*, 129 S. Ct. at 1835-37 (Breyer, J., dissenting) (describing effects on local broadcasters). Further, delay technology relies on split-second human judgments made in real time and is thus inevitably both over- and under-inclusive—over-editing some programs (chilling too much speech) and inadvertently failing to capture offensive material in other instances (risking massive sanctions). J.A. 285-86, 291, 295-96. Even when delay technology is used, a broadcaster may still face enormous fines if the FCC deems the broadcaster's efforts insufficiently diligent. See Pet. App. 66a-67a.

C. Petitioners' Attempts To Salvage The FCC's Vague Policy Are Unavailing.

1. Petitioners' procedural arguments are meritless. Petitioners principally rely on the assertion that to maintain a vagueness challenge a party must show that the challenged law is vague as to the conduct at issue. Pet. Br. 24-25 (quoting *HLP*, 130 S. Ct. 2718-19). Petitioners' arguments falter on a misconception of the vagueness inquiry.

As explained above, petitioners do not contest the Second Circuit's holding that the FCC's new indecency policy permits discriminatory enforcement, and petitioners' arguments centered on *HLP* are irrelevant to that holding.[26] This Court has explicitly

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[26] In *HLP*, the plaintiffs did "not argue that the . . . statute grants too much enforcement discretion," and, accordingly, the Court "address[ed] only" the issue of fair notice. 130 S. Ct. at 2719-20.

stated that, in such an inquiry, the "question is not whether discriminatory enforcement occurred *here*," and in evaluating a challenge under this prong of the vagueness doctrine, a court can "assume it did not." *Gentile*, 501 U.S. at 1051 (emphasis added). Rather, the fundamental concern is the "real possibility" of discriminatory enforcement that an indeterminate law creates. *Id.*; see also *Lawson*, 461 U.S. at 358 & n.8.

Even as to the Second Circuit's fair-notice holding, the decision below is entirely consistent with this Court's precedents. The court first determined the scope of the FCC's new indecency policy "'on its face,'" *United States* v. *Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (law "attacked as vague must initially be examined 'on its face'"), by examining the FCC's "further elaborat[ion]" of that policy in agency guidance and orders, Pet. App. 21a, 22a-24a; see *Grayned*, 408 U.S. at 110 (court "'relegated . . . to the words of the ordinance,'" the "interpretations [of] the court below," and the "interpretation . . . given by those charged with enforcing it" (first omission in original)); see also *Gentile*, 501 U.S. at 1048-51; *Giaccio*, 382 U.S. at 403; *Winter*, 333 U.S. at 512, 514, 518-19; Pet. Br. 34. Contrary to petitioners' claims (at 25), the court did not commit the same error that the lower court did in *HLP* by deciding "how the statute applied in hypothetical circumstances," 130 S. Ct. at 2719. Rather, the court examined *already decided* cases because the FCC has articulated its new policy through these adjudications, and the "guidance" provided by those cases is the only way the FCC can avoid a finding that its generic definition of indecency is vague. See *supra*, 40-41. The "conflicting results which have arisen from the painstaking attempts" to apply the new policy are

simply an "abundant demonstration" that the new policy is impermissibly vague. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

Further, the Second Circuit's determination that the FCC's new indecency policy relies on the FCC's subjective and unknowable judgments demonstrates that the policy is vague "as applied" to the Fox and ABC programs at issue. *Goguen*, 415 U.S. at 578. When a law is vague because "'no standard of conduct is specified at all,'" that law "affects all who are prosecuted under [it]." *Id.* Consequently, this Court in *Goguen* concluded that such a law must be construed as "void for vagueness as *applied to*" the challenger. *Id.* (emphasis added). Because the Second Circuit correctly concluded that the FCC's new indecency policy is so vague that "'no standard of conduct is specified at all,'" it properly struck down the new policy. *Id.* "It is well settled" that a law proscribing "no comprehensible course of conduct at all. . . . may not constitutionally be applied to any set of facts." *United States* v. *Powell*, 423 U.S. 87, 92 (1975).[27]

Petitioners invoke a bogeyman in claiming that by striking down the FCC's indecency policy "in its entirety," the Second Circuit foreclosed any indecency enforcement. Pet. Br. 25-26. The Second Circuit made clear that it was holding only that "the FCC's current policy fails constitutional scrutiny," and it did "not suggest that the FCC could not create a constitutional policy." Pet. App. 34a. All that is required is that the FCC regulate indecency in a way

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[27] Petitioners' claim (at 29-31) that the artistic necessity and *bona fide* news exceptions are irrelevant to the challenges here is wrong for the same reason.

that is "consistent with First Amendment principles," *Playboy*, 529 U.S. at 826-27, avoiding indeterminate standards and arbitrary enforcement.

2. Petitioners' other defenses are similarly meritless. Petitioners contend that the FCC's "enforcement practices would have given" Fox "fair warning" that the programs at issue "could be considered indecent." Pet. Br. 27. They are wrong.

Petitioners argue that the FCC "has long imposed sanctions on the broadcast of precisely such language," Pet. Br. 27, but they rely on inapposite decisions. *Eastern Education Radio* concerned a 50 minute interview in which the interviewee repeatedly—not fleetingly—used offensive words (like those in Carlin's routine). 24 F.C.C.2d at 409, 410, ¶¶ 3, 8. That decision also emphasized that the FCC "can appropriately act only in clear-cut, flagrant cases." *Id.* at 414, ¶ 14. *Pacifica* was limited to the "verbal shock treatment" of the Carlin routine. 438 U.S. at 757 (Powell, J., concurring); *id.* at 739, 741. It expressly did not "speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61 (Powell, J., concurring); *accord*, *id.* at 750 (same). These decisions are from the prior, restrained enforcement regime in which it was clear that the FCC would *not* punish the sort of speech at issue in the Fox broadcasts. See *supra*, 4-6.

The "networks' internal standards," which generally do not permit "fuck" and "shit" to be aired, are irrelevant to the vagueness analysis. Pet. Br. 28. The networks have adopted these internal policies for myriad reasons, balancing viewers' and advertisers' wants and needs in ways that have no necessary relationship to what is "patently offensive." The First Amendment does not permit the government to use an individual speaker's own editorial standards as

the legal boundary on what she may say; the mere fact that the *Washington Post* does not typically publish the word "fuck" does not mean that the government could constitutionally punish it if it did.

Petitioners fault the Second Circuit's examination of how the FCC has treated other potentially offensive words that arguably fit within the definition of "sexual or excretory activities or organs" and argue that the FCC "reasonably assessed the graphic nature and social acceptability of these words." Pet. Br. 28-29. But the issue is not social acceptability; it is whether the FCC has provided any objective standard for applying the "patent offensiveness" factors. The Second Circuit correctly explained that "in each of these cases, the Commission's reasoning consisted of repetition of one or more of the factors without any discussion of how it applied them. . . . This hardly gives broadcasters notice." Pet. App. 24a.

Petitioners similarly confuse what is at issue when they rely on this Court's decision in *Fox* to try to explain away the inconsistency between the FCC's indecency finding for the fleeting expletives at issue here and its failure to find "Saving Private Ryan" indecent. Pet. Br. 29-30. In *Fox*, this Court offered a possible rationalization for the FCC's different outcomes in those two particular orders, 129 S. Ct. at 1814 (suggesting that "Saving Private Ryan" had enough "frightening suspense" and "graphic violence" to drive most children out of the audience), but that after-the-fact rationalization has no grounding in the FCC's stated factors and in any event could not serve as the rigorous and predictable standard required by the First and Fifth Amendments.

Finally, petitioners argue that the vagueness of the indecency regime is ameliorated by the FCC's decisions to refrain from sanctioning broadcasters "in

cases where it was not clear at the time of the broadcast that the FCC would regard the pertinent material as indecent." Pet. Br. 31. But under FCC policy, the facts underlying a mere notice of apparent liability (which is functionally like a complaint, see 47 U.S.C. § 503(b)(5)), can be used against a broadcaster in licensing renewals.[28] The FCC's regulatory grace in this case was merely an acknowledgement of its change in policy; now that the FCC believes its new policy is "clear," it plainly intends to impose massive fines in future cases.

The FCC's new indecency policy relies on subjective judgments and gives the FCC unbounded discretion, thereby chilling substantial broadcast speech. Such an indeterminate policy is unconstitutional.

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[28] *Comm'n's Forfeiture Policy Statement & Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 15 FCC Rcd. 303 (1999).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Second Circuit.

Respectfully yours,

ELLEN S. AGRESS
MAUREEN A. O'CONNELL
FOX TELEVISION STATIONS, INC.
1211 Avenue of the Americas
New York, NY 10036
(212) 252-7204

CARTER G. PHILLIPS*
MARK D. SCHNEIDER
JAMES P. YOUNG
DAVID S. PETRON
RYAN C. MORRIS
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondent Fox Television Stations, Inc.

SUSAN WEINER
NBC UNIVERSAL, INC.
30 Rockefeller Plaza
New York, NY 10112

MIGUEL A. ESTRADA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

Counsel for Respondent NBCUniversal Media, LLC

JONATHAN H. ANSCHELL
CBS BROADCASTING INC.
4024 Radford Avenue
Studio City, CA 91604
(818) 655-1631

SUSANNA M. LOWY
CBS BROADCASTING INC.
51 West 52nd Street
New York, NY 10019
(212) 975-3406

Counsel for Respondent CBS Broadcasting Inc.

ROBERT CORN-REVERE
RONALD G. LONDON
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW Suite 800
Washington, DC 20006
(202) 973-4200

JOHN R. FEORE, JR.
KEVIN P. LATEK
DOW LOHNES PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20036
(202) 776-2000

Counsel for FBC Television Affiliates Association

November 3, 2011

* Counsel of Record

REPLY BRIEF

No. 10-1293

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v.

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v.

ABC, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

I. The Commission's indecency determinations are consistent with the Fifth Amendment 2
   A. The FCC's indecency policy is not unconstitutionally vague as applied to the broadcasts at issue here 2
   B. The FCC's indecency policy is not unconstitutionally vague on its face 7
II. The Commission's indecency determinations are consistent with the First Amendment 11
   A. As applied to the broadcasts at issue in this case, the Commission's indecency policy is consistent with the First Amendment 11
   B. Regulation of broadcast indecency does not violate the First Amendment 13

TABLE OF AUTHORITIES

Cases:

Action for Children's Television v. *FCC*:
   852 F.2d 1332 (D.C. Cir. 1988) 5, 7
   58 F.3d 654 (D.C. Cir. 1995), cert. denied, 516 U.S. 1043 (1996) 20
Brown v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729 (2011) 17, 22
CBS, Inc. v. *FCC*, 453 U.S. 367 (1981) 18
City of Erie v. *Pap's A.M.*, 529 U.S. 277 (2000) 7
Coates v. *City of Cincinnati*, 402 U.S. 611 (1971) 9
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Gonzales v. *Carhart*, 550 U.S. 124 (2007) 4
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2 F.C.C.R. 2705 (1987) 18
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Parker v. *Levy*, 417 U.S. 733 (1974) 3, 9
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512 U.S. 622 (1994) 18, 20, 21
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United States v. *Williams*, 553 U.S. 285 (2008) 5

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U.S. Const.:
Amend. I 1, 11
Amend. V 1, 2
Communications Decency Act of 1996, 47 U.S.C. 223 9
47 U.S.C. 223(a) 9
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47 U.S.C. 503(b)(5) 16
47 C.F.R.:
Section 0.445(3) 6
Section 73.3999(b) 10

Miscellaneous:

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REPLY BRIEF FOR THE PETITIONERS

The FCC's indecency policy is consistent with the Fifth and First Amendments, both as applied to the broadcasts at issue in this case and generally. Respondents' contrary arguments misconstrue this Court's precedents and reflect an audacious attempt to overturn Congress's longstanding judgment, upon which generations of parents have relied, that children should be protected from indecent material on the public airwaves.

I. THE COMMISSION'S INDECENCY DETERMINATIONS ARE CONSISTENT WITH THE FIFTH AMENDMENT

A. The FCC's Indecency Policy Is Not Unconstitutionally Vague As Applied To The Broadcasts At Issue Here

A party raising a vagueness challenge must demonstrate that the challenged "statute is vague as applied to the particular facts at issue." *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2718-2719 (2010) (*HLP*) (citing *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). The orders under review in this case made indecency determinations with respect to three particular broadcasts. Accordingly, "the focus of [the Court's] review must be" on the constitutionality of those particular determinations, *FCC* v. *Pacifica Found.*, 438 U.S. 726, 734-735 (1978) (*Pacifica*) (citation omitted), rather than on other adjudications not before the Court. See Gov't Br. 24-26.

1. Fox makes no effort at all to demonstrate that the FCC's indecency policy was vague as applied to its two broadcasts, which involved concededly gratuitous uses of the F-Word and S-Word during prime-time awards shows with millions of children in the audience. Indeed, when the broadcasts were aired in later time zones, Fox blocked the expletives, which are generally proscribed by its own broadcast standards and which have long been a focus of the FCC's indecency-enforcement efforts. See Gov't Br. 27-31. Fox contends that past Commission orders involving those words could not have alerted it that the Billboard Music Awards broadcasts would be considered indecent because the prior orders involved the "repeated[]" use of the expletives. Fox Br. 54. That observation is correct but irrelevant. This Court has already held that "the agency's decision not to impose any forfei-

ture or other sanction [on Fox] precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (*Fox*); see Gov't Br. 28 n.3.[1]

While acknowledging that its own standards "generally do not permit" broadcast of the F-Word or S-Word, Fox contends that those standards are "irrelevant to the vagueness analysis." Fox Br. 54; see Gov't Br. 28. Contrary to Fox's suggestion, the government's argument is not that Fox's "own editorial standards" establish the "legal boundary" of what it may broadcast (Fox Br. 54-55). Rather, those standards undermine Fox's vagueness claim by providing highly probative evidence of "contemporary community standards for the broadcast medium," a concept at the core of the FCC's indecency definition. Pet. App. 61a; cf. *Parker* v. *Levy*, 417 U.S. 733, 754 (1974) ("[F]urther content" to permissible speech regulation "may be supplied even in * * * areas [of uncertainty] by less formalized custom and usage.") (citation omitted).

Fox further contends that the government "do[es] not contest the Second Circuit's holding that the FCC's new indecency policy permits discriminatory enforcement, and [the government's] arguments centered on *HLP* are irrelevant to that holding." Fox Br. 51. That contention is doubly incorrect. First, contrary to Fox's suggestion (Fox Br. 42), the Second Circuit did not make two inde-

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[1] The CBS and NBC affiliates dispute the premise that the Commission did not sanction Fox, contending, *inter alia*, that the agency might "us[e] its findings to justify enhanced penalties in the event of future violations." CBS & NBC Affiliates Br. 17. The Commission stated, however, that it "will not consider the broadcast to have an adverse impact upon * * * licensees as part of the renewal process *or in any other context*." Pet. App. 86a (emphasis added); see *id.* at 97a (same).

pendent vagueness holdings. Instead, the court of appeals addressed one question: "whether the FCC's indecency policy provides a discernible standard by which broadcasters can accurately predict what speech is prohibited." Pet. App. 22a; see *Gonzales* v. *Carhart*, 550 U.S. 124, 150 (2007) (noting that same statutory elements that provided fair notice "establish[ed] minimal guidelines to govern law enforcement") (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974)). To be sure, the court believed that one adverse consequence of the purported vagueness of the FCC's indecency standards was "the risk that such standards will be enforced in a discriminatory manner." Pet. App. 28a. The court did not suggest, however, that this consequence was an independent ground for finding the Commission's policy unconstitutionally vague.

Second, a party whose conduct is clearly covered by a challenged law cannot evade the rule reaffirmed in *HLP* simply by packaging its claim as one of potential discriminatory enforcement. The Court in *HLP* made clear that the rule regarding as-applied vagueness challenges applies to both:

> "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." We consider whether a statute is vague as applied to the particular facts at issue, for "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

130 S. Ct. at 2718-2719 (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008), and *Hoffman Estates*, 455 U.S. at 495).

2. Unlike Fox, ABC and its affiliates attempt to demonstrate that the FCC's indecency policy was unconstitutionally vague as applied to their own broadcast. Those arguments reduce to the contention that the Commission could not sanction the NYPD Blue episode because it had not previously sanctioned one exactly like it. That standard, if adopted, would cripple the FCC's ability to respond to the varied forms that broadcast indecency can take. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1337-1338 (D.C. Cir. 1988) (R.B. Ginsburg, J.) (*ACT I*) (affirming FCC's decision to apply its generic definition of indecency to varied content, rather than limiting enforcement to the previously sanctioned Carlin words). The proper standard is whether a broadcaster of "ordinary intelligence" would have had "fair notice" that the nude bathroom scene in the *Nude Awakening* episode would be considered indecent. See *HLP*, 130 S. Ct. at 2718. That standard was satisfied in this case. See Gov't Br. 31-32.

ABC contends that it had insufficient notice that "non-sexualized" nudity could be indecent. ABC Br. 19-21. But see Pet. App. 143a ("The viewer is placed in the voyeuristic position of viewing an attractive woman disrobing as she prepares to step into the shower."). More than 30 years ago, however, this Court in *Pacifica* explicitly rejected the contention that only material with "prurient" appeal could be considered indecent. 438 U.S. at 741. The Court explained that "the normal definition of 'indecent' merely refers to noncomformance with accepted standards of morality," and the Commission has long said that "the televising of nudes" may qualify. *Id.*

at 740, 741 n.16 (quoting *Enbanc Programing Inquiry*, 44 F.C.C. 2303, 2307 (1960)).

ABC and its affiliates also contend that the Commission's indecency finding was inconsistent with unpublished staff letters in which longer displays of nudity were found not to be indecent. See ABC Br. 18-19; ABC Affiliates Br. 37-39. The Commission's analysis in this case, however, was not based on a conclusion that the nudity was lengthy. To the contrary, the agency "concede[d] that a longer scene or additional depictions of nudity throughout the episode would weigh more heavily in favor of an indecency finding." Pet. App. 142a. Rather, the agency based its indecency determination on findings that the nudity was "graphic and explicit," *id.* at 140a; that "repeated" camera shots of the actress's buttocks had "focuse[d] on her nudity," *id.* at 142a; and that the scene was "pandering, titillating, and shocking," in part because it placed viewers in a "voyeuristic" position, *id.* at 143a. In any event, respondents do not contend that they knew about (much less relied upon) those unpublished and conclusory staff letters, and the Commission has made clear that such letters have no precedential effect. See 47 C.F.R. 0.445(e); see also *Independent Ins. Agents of Am., Inc.* v. *Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993) ("In 'the real world of agency practice,' informal unpublished letters 'should not engender reliance.'") (quoting *Malkan FM Assocs.* v. *FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991)).

ABC further contends that it lacked notice that the warning it aired at the outset of the broadcast would not immunize it from an indecency finding. ABC Br. 22-23. Although the Commission "agree[d] with ABC that the parental advisory and rating at the beginning of the program is relevant and weighs against a finding of inde-

cency," Pet. App. 148a, the Commission has never held that such warnings will, by themselves, preclude an indecency finding. Indeed, the broadcast at issue in *Pacifica* included such a warning, 438 U.S. at 730, but the Court nonetheless upheld the Commission's indecency determination, recognizing that "prior warnings cannot completely protect the listener or viewer from unexpected program content," *id.* at 748.[2]

B. The FCC's Indecency Policy Is Not Unconstitutionally Vague On Its Face

The FCC's generic definition of indecency—"language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," *Pacifica*, 438 U.S. at 732 (citation omitted)—is the same one whose application the Court upheld in *Pacifica*. See *Fox*, 129 S. Ct. at 1806; *ACT I*, 852 F.2d at 1339. Since *Pacifica*, the agency has further clarified that definition in a detailed industry guidance document that includes numerous illustrative examples.

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[2] ABC and its affiliates further contend that the NYPD Blue episode fell outside the agency's indecency definition because buttocks are not a "sexual or excretory organ." ABC Br. 15; ABC Affiliates Br. 31-32. That contention is insubstantial. Rather than relying on technical medical definitions, the Commission reasonably applies a commonsense understanding of these terms, grounded in contemporary community standards for the broadcast medium. See Pet. App. 135a. Under that approach, the buttocks, "though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal[,] closely associated by most people with excretory activities," and not generally displayed in public. *Id.* at 133a; see *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 283 n.* (2000) (upholding ordinance banning public nudity, defined to include showing the "buttocks with less than a fully opaque covering").

See *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999 (2001) (*Industry Guidance*).

In that guidance, the Commission explained that "[i]ndecency findings involve at least two fundamental determinations." 16 F.C.C.R. at 8002 ¶ 7. First, the material "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Ibid.* (citation omitted). Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8 (emphasis omitted). Although that second inquiry is "highly fact-specific," *id.* at 8002 ¶ 9, the agency has identified three "principal factors" that guide its analysis: the "explicitness" of the material; whether the broadcast "dwells on or repeats at length" the material; and "whether the material appears to pander or is used to titillate, [and] whether the material appears to have been presented for its shock value." *Id.* at 8003 ¶ 10 (emphasis omitted). The generic definition of indecency that was upheld in *Pacifica* and *ACT I*, as supplemented by the detailed discussion in the *Industry Guidance*, is not vague on its face.

Fox's fundamental contention is that the FCC's indecency policy must be vague "as applied" to the Billboard Music Awards broadcasts because that policy is vague in *all* its applications. Fox Br. 53 (quoting *Goguen*, 415 U.S. at 578). To prevail on that facial vagueness challenge, Fox must show that the "provision is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is

specified at all.'" *Parker*, 417 U.S. at 755 (quoting *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971)); see Fox Br. 53 (acknowledging this is standard for its facial vagueness claim). The FCC's indecency policy is "subject to no such sweeping condemnation." *Parker*, 417 U.S. at 755.

To demonstrate that the FCC's indecency policy has prescribed "no standard of conduct * * * at all" (*Parker*, 417 U.S. at 755), respondents would have to show that it was uncertain whether that policy would cover the Carlin monologue. Respondents likewise would have to demonstrate that it is unclear whether the policy proscribes shock-jock and other broadcasts that the Commission has previously found indecent based on their explicit and extended discussion of sexual acts. See Gov't Br. 6 (providing examples). Respondents' inability to make, or even attempt, such showings dooms their facial vagueness challenge.

Respondents contend that in *Reno* v. *ACLU*, 521 U.S. 844 (1997), "this Court struck down as unconstitutionally vague a 'definition of indecency [that] was almost identical to the Commission's definition." Fox Br. 40 (quoting Pet. App. 21a); see ABC Br. 13. That is incorrect. The two indecency prohibitions at issue in *Reno*, which were set forth in the Communications Decency Act of 1996 (CDA), 47 U.S.C. 223(a) and (d), were not "almost identical" to the Commission's indecency rule. One of the CDA prohibitions applied simply to "indecent" communications without "any textual embellishment at all." 521 U.S. at 871 n.35. The other covered Internet content that was "patently offensive as measured by contemporary community standards," without any medium-based qualification or further elucidation by a regulatory body. *Id.* at 860. By contrast, the Commission's definition rests

on longstanding, medium-based norms (contemporary community standards *for the broadcast medium*), and the *Industry Guidance* provides additional definition and explains in detail how the Commission applies it. See pp. 7-8, *supra*.

Far from equating the prohibitions, the Court in *Reno* expressly distinguished the CDA provisions it found unconstitutional from the indecency regime at issue here. The Court emphasized that the FCC has "been regulating radio stations for decades" and that in *Pacifica* the Commission had "targeted a specific broadcast that represented a rather dramatic departure from traditional program content." *Reno*, 521 U.S. at 867. The Court further explained that there was no such "traditional program content" on the Internet because "[n]either before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry." *Id.* at 868-869.

The Court in *Reno* also noted two other critical distinctions between broadcast regulation and the CDA's regulation of the Internet. First, because the Commission's indecency policy does not apply to materials broadcast after 10 p.m., it merely "designate[s] when—rather than whether—it would be permissible to air" indecent material. 521 U.S. at 867; see 47 C.F.R. 73.3999(b). The CDA prohibitions, by contrast, were "not limited to particular times." *Reno*, 521 U.S. at 867. For that reason, in any case where the application of the relevant laws to particular materials was unclear, the CDA prohibitions were far more likely than the FCC's indecency regime to induce potential disseminators to withhold borderline materials altogether. Second, the CDA imposed criminal sanctions of "up to two years in prison for each act of

violation." *Id.* at 867, 872. By contrast, the Commission is not authorized to impose criminal liability on broadcasters, and the Court's holding in *Pacifica* was limited to civil enforcement of the prohibition on indecent broadcasts. See *id.* at 867 (citing *Pacifica*, 438 U.S. at 750); see also *Hoffman Estates*, 455 U.S. at 498-499 ("The Court has * * * expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."); *Pacifica*, 438 U.S. at 739 n.13.

II. THE COMMISSION'S INDECENCY DETERMINATIONS ARE CONSISTENT WITH THE FIRST AMENDMENT

A. As Applied To The Broadcasts At Issue In This Case, The Commission's Indecency Policy Is Consistent With The First Amendment

1. This Court "ha[s] never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815. Fox nevertheless contends that the First Amendment permits regulation of (at most) "verbal shock treatment" and "graphic sexual material that [is] overtly pornographic." Fox Br. 27, 28 (quoting *Pacifica*, 438 U.S. at 757 (Powell, J., concurring)); see ABC Br. 38-39. That contention reflects an unduly narrow understanding of the rationale for the Commission's indecency regime.

"Congress has made the determination that indecent material is harmful to children," and the government interest in protecting children from such material is the same here as it was in *Pacifica*. *Fox*, 129 S. Ct. at 1813; see *ibid.* ("There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of

them."). The *Pacifica* Court's observation that the Carlin monologue "could have enlarged a child's vocabulary in an instant," 438 U.S. at 749, is equally true of Fox's broadcasts. "Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." *Fox*, 129 S. Ct. at 1813.

2. ABC contends that the First Amendment bars the imposition of any sanction for its broadcast of the bathroom scene in *Nude Awakening* because viewing that scene would not harm children. ABC Br. 39. The presence or absence of such harm is inherently uncertain, however, because "[o]ne cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency." *Fox*, 129 S. Ct. at 1813. This Court has recognized that children's reactions to nude images may be different from adults', and that the government therefore has a legitimate interest in keeping such images from them. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a criminal conviction for selling to children a "girlie" magazine containing "pictures which depicted female 'nudity,'" including "the showing of . . . female . . . buttocks with less than a full opaque covering." *Id.* at 632-633 (citation omitted). While recognizing that such material was not obscene as to adults, *id.* at 634, the Court held that the government had a legitimate interest in preventing its dissemination to children because such material could "impair[] the ethical and moral development of our youth," *id.* at 641 (citation omitted).

The same interest is implicated here. "[T]he normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." *Pacifica*, 438

U.S. at 740. In our society, appearing nude in front of strangers—including showing one's buttocks—contravenes such standards, especially when children are present. Cf. *Ginsberg*, 390 U.S. at 643 n.10 ("[O]penly permit[ting]" children to view pornographic images "implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego.") (citation omitted).

B. Regulation Of Broadcast Indecency Does Not Violate The First Amendment

The network respondents ask this Court to overrule *Pacifica* and invalidate all broadcast indecency regulation. See Fox Br. 17-26; ABC Br. 48-56. Other respondents, including groups representing affiliates of three of the broadcast networks, pointedly decline to embrace that sweeping argument. See ABC Affiliates Br. 17, 26 n.26; CBS & NBC Affiliates Br. 29. The network respondents have not met the demanding standard required for this Court to overrule one of its precedents. See Gov't Br. 41.

1. Without broadcast-indecency regulation, "[a]nything that could be sold at a newsstand"—or shown on premium cable channels or made available on the Internet—could be aired on broadcast television in the middle of the afternoon. *Pacifica*, 438 U.S. at 744 n.19 (plurality op.). Such broadcasts could include the Carlin monologue, as well as material with "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." *In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, 932 ¶ 20 (1987); see Gov't Br. 6. Fox contends that "there

is no evidence for this alarmist prediction," Fox Br. 25; see ABC Br. 57, but the examples the government cites are not hypotheticals—they come from actual programs that broadcasters have aired even with indecency regulation in place. The inference that more such broadcasts would occur in the *absence* of indecency regulation is a matter of common sense.

Indeed, amicus National Association of Broadcasters candidly acknowledges that it supports relaxation of broadcast indecency regulation so that broadcasters can better compete against "cable and satellite providers [who] are [currently] able to offer their viewers content that broadcasters simply cannot." NAB Br. 33; see *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 472 (2d Cir. 2007) (Leval, J., dissenting) ("[T]he regulated networks compete for audience with the unregulated cable channels, which increasingly make liberal use of their freedom to fill programming with * * * expletives."), rev'd, 129 S. Ct. 1800 (2009); Student Press Law Ctr. Amicus Br. 31-34 (college radio stations eager for end to indecency regulation so that they can play songs with expletives during the day).

2. The network respondents emphasize that fewer households now view video programming by means of broadcast than was the case at the time of *Pacifica*. See Fox Br. 18-21; ABC Br. 51-53. Yet television broadcast programming has retained its dominance despite the proliferation of different ways of accessing it. See Gov't Br. 45. Moreover, millions of Americans still live in broadcast-only households, see *id.* at 44-45, and low-income children are disproportionately represented in that group, see American Acad. of Pediatrics Amicus Br. 16 (AAP Amicus Br.) ("[W]hile 98% of children under age

eight in households with incomes of $30,000 or less have a television, only 53% have cable.").

The rise of alternative, unregulated platforms for video programming has, if anything, strengthened the need for broadcast-indecency regulation. Because of "the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable," the need remains for "more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children." *Fox*, 129 S. Ct. at 1819. At the same time, the rise of those alternative platforms has dramatically reduced the burden of broadcast-indecency regulation on those adults who wish to produce or view indecent programming, see Gov't Br. 48-49, just as the widespread availability of digital video recording devices that permit time-shifted viewing (Fox Br. 23 n.11) has materially reduced the burden of requiring indecent material to be broadcast after 10 p.m.[3]

Fox questions why broadcasters should be "single[d] out * * * as a 'safe haven' from among an abundance of substitutes." Fox Br. 38 (emphasis omitted); see ABC

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[3] Fox mischaracterizes the FCC's indecency rule as a "content-based ban." Br. 24. Instead, it is a time-channeling rule that requires only that indecent material be shown after 10 p.m. By contrast, a number of the decisions on which the network respondents rely, see, *e.g.*, *Erznozik* v. *City of Jacksonville*, 422 U.S. 205 (1975), cited in Fox Br. 29-30, addressed flat prohibitions. "*Pacifica* is readily distinguishable" from those cases, "most obviously because it did not involve a total ban on broadcasting indecent material," and because those cases, unlike *Pacifica*, did not rest on "the 'unique' attributes of broadcasting." *Sable Commc'ns, Inc.* v. *FCC*, 492 U.S. 115, 127 (1989). The fact that the Commission cannot impose forfeiture liability unless a violation is willful, see Pet. App. 86a, 97a n.206, 182a, further ameliorates First Amendment concerns. Cf. *Mishkin* v. *New York*, 383 U.S. 502, 510-511 (1966).

Br. 56. The answer is that broadcasters, from the very inception of the medium, have been granted highly favorable regulatory treatment and have compensated the public for that treatment by taking licenses subject to enforceable public-interest obligations. See *Fox*, 129 S. Ct. at 1806. Unlike speakers in other media, broadcasters exploit an extraordinarily valuable public resource without charge to reach their audience—a resource for which other categories of speakers must pay billions of dollars. Although the public asks for relatively little in return, broadcasters' responsibilities when using the public airwaves include the obligation not to broadcast indecent material during the portion of the day (*i.e.*, before 10 p.m.) when children are most likely to be in the audience.

In its basic form, this obligation has been in place since the beginning of broadcasting in the 1920s, and it is one of the medium's defining features. See Gov't Br. 52-53.[4] In questioning whether adherence to that obliga-

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[4] Fox contends that "neither broadcasters nor the public has any vested 'understanding' or 'expectations' concerning the FCC's *current*, expanded enforcement policy." Fox Br. 38. That observation is beside the point, however, because Fox asks the Court to invalidate *all* broadcast-indecency enforcement, not just the Commission's current policies. Fox Br. 17-26. Fox also points out (Br. 38) that nonlicensees could in theory be subject to liability for violating the Commission's indecency regime. But the Commission may impose a forfeiture against a nonlicensee only if the nonlicensee receives a "citation of the violation charged," is "given a reasonable opportunity for a personal interview with an official of the Commission," and again "engages in [the] conduct." 47 U.S.C. 503(b)(5). The Commission has not used that elaborate statutory procedure in broadcast-indecency cases, instead imposing forfeitures only on broadcast licensees. To the extent that enforcement of the Commission's indecency regime might raise distinct First Amendment concerns in a case involving a nonlicensee, those

tion is actually a traditional feature of the broadcast medium, ABC states that until the 1970s, "there was almost no actual regulation" of broadcasts specifically identified as indecent. ABC Br. 57. But that is simply because broadcasters complied with their public-interest obligation not to air indecent material.[5]

Fox contends that this "grand bargain" has not previously been identified as a basis for indecency regulation. Fox Br. 35. But the Court's prior decision in this very case drew the connection:

> Twenty-seven years ago we said that "[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." One of the burdens that licensees shoulder is the indecency ban.

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concerns can be addressed on an as-applied basis if such a case ever arises.

[5] The long history of broadcast-indecency regulation is among the reasons that *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), which respondents repeatedly invoke (*e.g.*, Fox Br. 16), is inapposite. That decision recognized that even a "novel restriction on content" may survive First Amendment scrutiny if it is "part of a long * * * tradition of proscription." 131 S. Ct. at 2734; see *id.* at 2736 (stressing absence of "a longstanding tradition in this country of specially restricting children's access to depictions of violence"). In addition, *Brown* involved privately sold video games, which the Court analogized to books for constitutional purposes, see *id.* at 2736-2737 & n.4, and whose dissemination does not depend on any form of government assistance. By contrast, broadcasting over the public airwaves implicates "special justifications for regulation * * * not applicable to other speakers," including "the scarcity of available frequencies," *Reno*, 521 U.S. at 868, and the consequent need for a governmental role in allocating the available spectrum.

Fox, 129 S. Ct. at 1806 (quoting *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981)) (paragraph break omitted). And while the Commission at one point declined to rely on spectrum scarcity to support indecency regulation, see Fox Br. 36 & n.19 (citing *In re Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705, 2707 ¶ 7 n.7 (1987)), the Commission later said that among the "special justifications" for broadcast indecency regulation are "the history of extensive government regulation of the broadcast medium" and "the scarcity of available frequencies at its inception," *Industry Guidance*, 16 F.C.C.R. at 8000 ¶ 4 & n.9 (quoting *Reno*, 521 U.S. at 868, which in turn cited *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) and *Pacifica*).

Fox also contends that the "scarcity doctrine has no continuing validity, if it ever did." Fox Br. 36. But "the unique physical limitations of the broadcast medium" have not changed over time. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) (*Turner I*). To the contrary, the demand for spectrum increases every year, as does the difficulty of the decisions about how spectrum should be allocated to best serve the public interest. And it remains true today that "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals." *Ibid.* The feasibility of broadcasting therefore continues to depend on the "establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters." *Id.* at 638.

Although there are "more than twice as many over-the-air broadcast stations than there were 40 years ago," Fox Br. 37, each of those stations enjoys an exclusive license to public spectrum that others cannot legally use.

"[T]he proper question is not how many outlets there are, or how many outlets are technologically feasible, but how great the demand is for the available spectrum in light of the regulatory scheme." Center for Creative Voices et al. Br. 36. The continuing high demand is demonstrated by estimates of how many billions of dollars could be raised if the spectrum broadcasters presently use without charge were auctioned for use by others, such as wireless Internet providers. See *id.* at 36-37; see generally Congressional Budget Office Cost Estimate, *S. 911, Public Safety Spectrum & Wireless Innovation Act* (July 20, 2011). And the growth of new, nonbroadcast media platforms, Fox Br. 37, says nothing about the scarcity of broadcast spectrum itself.

Fox's observation that all "economic goods are scarce" (Fox Br. 37) likewise does not advance respondents' argument. Where scarcity results from economic factors (as in the newspaper industry), and no need exists for government to choose among would-be speakers, the fact of scarcity alone cannot justify content-based regulation that would otherwise violate the First Amendment. The salient feature of the broadcast medium, by contrast, is that the government must select among would-be participants seeking to exploit this uniquely public resource, and must enforce prohibitions on the use of spectrum by those who are not selected, in order for the medium to function at all. As especially privileged beneficiaries of those selection and enforcement mechanisms, respondents may reasonably be required to accept public-interest obligations that could not constitutionally be imposed on persons who speak without government assistance.

2. The network respondents also contend that *Pacifica* should be overruled because broadcast televi-

sion is no longer "uniquely accessible to children." Fox Br. 21; see ABC Br. 51-55. That contention lacks merit.

The network respondents assert that "cable, satellite, [and] telephone-company-provided television services" now have "the same accessibility to children * * * as broadcast television." ABC Br. 51; see Fox Br. 21-22. This argument is misconceived. Because the alternative services to which respondents refer are available only by subscription, their accessibility to children depends on an affirmative act by a parent or guardian beyond the initial procurement of a television. Broadcasting, by contrast, comes into the home without subscription, and "[u]nlike cable subscribers, who are offered such options as 'pay-per-view' channels, broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters." *Action for Children's Television* v. *FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996). Allocating valuable spectrum to broadcasting services helps to provide all Americans with access to news, public affairs, and cultural programming without their having to subscribe to alternative (and often expensive) services. See *Turner I*, 512 U.S. at 663. Requiring conscientious parents to cut their families off from television programming in its entirety (by not purchasing a television or an antenna) in order to avoid indecent material is fundamentally at odds with that longstanding policy objective.

In arguing that broadcast programming is no longer uniquely accessible to children, the network respondents also rely on the availability of "V-Chip" blocking technology. Fox Br. 22; ABC Br. 54. The V-Chip, however, has not materially diminished "[t]he ease with which children may obtain access to broadcast material." *Pacifica*, 438 U.S. at 750. Indeed, even under strict scrutiny (which is

inapplicable here, see Pet. App. 14a[6]), a proffered less-restrictive alternative must be "at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno*, 521 U.S. at 874; see *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) (*Playboy*) (government may defend content-based speech restriction when it "prove[s] that [a less-restrictive] alternative will be ineffective to achieve its goals").

As the American Academy of Pediatrics explains in detail, "[e]xperience has shown that the V-Chip and its underlying ratings scheme have not and cannot provide an effective tool for protecting children from inappropriate content." AAP Amicus Br. 16; see Gov't Br. 49-51; *In re Implementation of the Child Safe Viewing Act*, Report, 24 F.C.C.R. 11,413, 11,420 ¶ 14 (2009). Many parents are unaware of the V-Chip, and even those who know about it find it difficult, if not impossible, to use. See AAP Amicus Br. 21-22. In *Playboy*, the Court held that, where a proffered less-restrictive alternative could be "effective" "if publicized," it could not be deemed ineffective simply because lack of publicity had prevented its widespread use. 529 U.S. at 816. "In contrast" to the situation in *Playboy*, "the V-Chip has been heavily pro-

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[6] ABC contends (Br. 41-48) that the availability of the V-Chip means that, even if *Pacifica* is not overruled, the constitutionality of indecency regulation "must, at a minimum, be reconsidered as to blockable programs." Under the intermediate scrutiny that applies to broadcast-indecency regulation under *Pacifica* (Pet. App. 14a), however, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner I*, 512 U.S. at 662. Instead, "[s]o long as the means chosen are not substantially broader than necessary * * * the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 218 (1997) (citation omitted).

moted for over a decade," AAP Amicus Br. 24, and the technology has still proved ineffective.

Moreover, many programs are not rated at all, and even for rated programs, a recent study found that "only 5% of parents felt that television ratings were always accurate." AAP Amicus Br. at 22. Indeed, "[s]tudies have shown that many programs are not accurately rated and that a large amount of objectionable content reaches children." *Id.* at 24-25. The problem of inaccurate ratings—along with the failure of the industry to do anything about it, see *id.* at 27—has led not to a "modest gap" in the rating scheme (*Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011)), but to its wholesale unreliability as an alternative to indecency regulation.[7]

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2011

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[7] While the network respondents' arguments for invalidating indecency regulation for television broadcasting fail for the reasons discussed above, the network respondents do not even attempt to explain why such regulation is infirm as applied to radio. Radio broadcasting remains uniquely pervasive and uniquely accessible to children, see Gov't Br. 44, 46 n.5, and there is no V-Chip for radio.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1293

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN ACADEMY OF PEDIATRICS, AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, BENTON FOUNDATION, CHILDREN NOW, AND UNITED CHURCH OF CHRIST OFFICE OF COMMUNICATION, INC. IN SUPPORT OF AFFIRMANCE

Angela J. Campbell
Counsel of Record
Blake E. Reid
Institute for Public
Representation
Georgetown Law
600 New Jersey Ave. NW
Washington, DC 20001
202.662.9535
ipr-efiling@law.georgetown.edu

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF CITED AUTHORITIES iii
INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 3
ARGUMENT 4
I. The Court should affirm the court of appeals' holding that the FCC's indecency policy is unconstitutionally vague. 4
II. The Court should not disturb *Red Lion* or *Pacifica*. 5
A. Disturbing *Red Lion* could endanger laws and regulations designed to benefit children 5
1. The CTA and the rules implementing it are premised on *Red Lion*. 6
2. The CTA and underlying FCC rules have benefited children. 10
3. Disturbing *Red Lion* may result in constitutional challenges to the CTA and FCC rules that benefit children. 13
B. Disturbing *Pacifica* is unnecessary and could harm children. 15
III. The V-Chip does not provide an effective less-restrictive alternative means for protecting children from inappropriate content 16

A. The V-Chip and underlying TV ratings were intended to provide a tool for parents to protect their children from indecent broadcast content. 17

B. In practice, the V-Chip has not provided parents with an effective tool to protect their children. 20

1. Despite significant promotional efforts, many parents remain unaware of or unable to use the V-Chip and/or do not know what the underlying ratings mean. 23

2. The V-Chip's underlying ratings are neither accurately nor consistently applied. 24

CONCLUSION 28

TABLE OF CITED AUTHORITIES

Cases

Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729 (2011) 13, 26

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) ..... *passim*

FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) 14

Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011) ... 5

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ..... *passim*

Reno v. ACLU, 521 U.S. 844 (1997) 16

U.S. v. *Playboy Entertainment Group*, 529 U.S. 803 (2000) 23, 24

Statutes and Legislative Materials

141 CONG. REC. H8481-01 (1995) (statement of Rep. Edward Markey) 19

141 CONG. REC. S8225-01 (1995) (letter introduced by Sen. Kent Conrad) 19

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H.R. REP. NO. 101-385 (1989) 9, 12

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47 C.F.R. § 73.3999 25

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FCC, THREE YEAR REVIEW OF THE IMPLEMENTATION OF THE CHILDREN'S TELEVISION RULES AND GUIDELINES 1997-1999 1 (2001) 10

Implementation of Section 551, 13 FCC Rcd. 8232 (1998) 17, 18, 19, 27

Implementation of the Child Safe Viewing Act, 24 FCC Rcd. 11413 (2009) 20, 21, 24, 27

Policies and Rules Concerning Children's Television Programming, 11 FCC Rcd. 10660 (1996) 9, 12, 13, 14

Other Materials

ALETHA C. HUSTON ET. AL., BIG WORLD, SMALL SCREEN (1992) 12

AMY B. JORDAN, IS THE THREE-HOUR RULE LIVING UP TO ITS POTENTIAL? (2000) 11

AMY JORDAN & EMORY WOODARD, PARENTS' USE OF THE V-CHIP TO SUPERVISE CHILDREN'S TELEVISION USE 3 (2003) 21, 22

ARBITRON, RADIO TODAY 2011: HOW AMERICA LISTENS TO RADIO (2011) 25

BARBARA J. WILSON, ET AL., EDUCATIONALLY/INSUFFICIENT? AN ANALYSIS OF THE AVAILABILITY & EDUCATIONAL QUANTITY OF CHILDREN'S E/I PROGRAMMING (2008) 11

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CABLE PUTS YOU IN CONTROL, http://controlyourtv.org 24

Children's Television Act, FCC.GOV 7, 8

COMMON SENSE MEDIA, ZERO TO EIGHT: CHILDREN'S MEDIA USE IN AMERICA (2011) 15, 16

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DALE KUNKEL ET. AL., *Assessing the Validity of V-Chip Rating Judgments: The Labeling of High-Risk Programs*, *in* THE ALPHABET SOUP OF TELEVISION PROGRAM RATINGS (Bradley Greenberg ed., 2001) 25

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Frequently Asked Questions, ESRB.ORG..... 26

KAISER FAMILY FOUNDATION, PARENTS, CHILDREN, AND MEDIA: A KAISER FAMILY FOUNDATION SURVEY (2007)..... 21, 22

NBC Television Network, COMCAST.COM.....26, 27

Phil Kurz, *46 Million Americans Still Watch TV Exclusively over the Air, says Report*, BROADCASTENGINERING.COM..... 15

Reasons for Movie Ratings: The Classification and Rating Administration, FILMRATINGS.COM..... 26

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-659, CHILDREN'S TELEVISION ACT: FCC COULD IMPROVE EFFORTS TO OVERSEE ENFORCEMENT AND PROVIDE PUBLIC INFORMATION (2011).....10, 11

VICTORIA RIDEOUT, PARENTS MEDIA AND PUBLIC POLICY: A KAISER FAMILY FOUNDATION SURVEY (2004)..... 26

William Clinton, President of the United States, 1996 State of the Union Address (Jan. 22, 1996)..... 19

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations concerned with the well-being of children. They have long recognized that media can have both beneficial and harmful effects on children. *Amici* advocate before Congress and the FCC for policies designed to ensure that children have access to high quality educational programming specifically designed for children and to limit children's exposure to programming with inappropriate violence, sexuality, and commercialism.

The American Academy of Pediatrics ("AAP") is an organization of 60,000 pediatricians committed to the attainment of optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults. The AAP offers resources to help educate parents about the effects of media on their children and give them ideas for maintaining a healthy approach to media for their children.

The American Academy of Child and Adolescent Psychiatry ("AACAP") comprises over 7,500 child and adolescent psychiatrists and other physicians dedicated to improving the quality of life for children, adolescents, and families affected by mental, behavioral, or developmental disorders. AACAP supports the development of dedicated children's televi-

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[1] All parties to this case have filed letters consenting to the filing of *amicus curiae* briefs in support of either party or of neither party. No counsel for a party authored this brief, either in whole or in part, and no party, counsel for a party, or any other person other than *amici curiae* or their members or counsel made a monetary contribution intended to fund the preparation or submission of this brief.

sion programming and tools to help parents protect their children from the negative mental health effects of viewing inappropriate content.

The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest.[2] It pursues this mission by seeking policy solutions that support the values of access, diversity and equity, and by demonstrating the value of media and telecommunications for improving the quality of life for all.

Children Now is a national organization for people who care about children and want to ensure that they are the top public priority. In particular, Children Now works to ensure that broadcast television serves children's interests by maximizing its educational value and minimizing its negative health effects.

The Office of Communication, Inc. of the United Church of Christ, ("OC, Inc."), is the media justice arm of the United Church of Christ, a faith community rooted in justice with 5,700 local congregations across the United States. OC, Inc. works to promote public interests in the media, especially for people of color, women, and children.

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[2] These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

SUMMARY OF ARGUMENT

Amici agree with respondents that the FCC's current indecency enforcement regime is unconstitutionally vague. The regime leaves parents without a clear idea of what their children might see or hear while watching broadcast television. Accordingly, the Court should affirm the court of appeals on vagueness grounds.

The Court need not and should not go beyond vagueness to resolve this case. In particular, there is no need for the Court to revisit the long-standing precedents of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Disturbing *Red Lion* could endanger the Children's Television Act of 1990 ("CTA"). The CTA and the FCC rules implementing it have succeeded in increasing the quantity of educational programming for children and limiting advertising on children's programs. They also prevent advertisers from taking unfair advantage of children's immaturity. Experience with deregulation indicates that in the absence of such regulations, market forces provide insufficient incentives for broadcasters to carry children's educational programming or limit harmful advertisements during children's programming.

The CTA and underlying FCC rules are premised on *Red Lion*'s holding that conditioning the award of broadcast licenses on serving the public interest is consistent with the First Amendment. Any action casting doubt on *Red Lion* could lead to challenges to the CTA and related FCC rules. Although substantial research demonstrates the educational

value of children's programming and the harms associated with children viewing inappropriate content, it is uncertain whether this research would satisfy strict scrutiny.

Amici further agree with respondents that the FCC's indecency enforcement in the present cases is not justified under *Pacifica*. But there is no need to revisit *Pacifica* because the premises underlying *Pacifica*—that broadcast television is pervasive and uniquely accessible to children—continue to be valid.

Finally, should the Court choose to evaluate the FCC's indecency regime under a heightened level of scrutiny, it should reject the proposition that the V-Chip and underlying ratings provide an equally effective, less-restrictive alternative to government regulation. Despite the availability of V-Chip functionality in most television sets and strong promotional and educational efforts, very few parents are aware of the V-Chip's existence, know how to use it, or understand the ratings system. Moreover, the impossibility of accurately and consistently rating the vast number of television programs makes the system unreliable and thus ineffective as an alternative to government regulation.

ARGUMENT

I. The Court should affirm the court of appeals' holding that the FCC's indecency policy is unconstitutionally vague.

Amici agree with respondents ABC, Inc., et al., ("ABC, Inc.") that the Commission has not articulated a policy that is "sufficiently clear and consistent to place broadcasters on notice of what material will be deemed indecent." ABC, Inc. Br. at 14. The

FCC's indecency policy also fails to provide parents with a clear idea of what they can expect their children to see or hear while watching broadcast television programming. Affirming the court of appeals' finding of vagueness likely will result in more restrained FCC enforcement of the indecency prohibition or prompt the FCC to adopt new standards through a rulemaking.[3] Either result would afford parents greater certainty and the ability to make reasonable viewing choices for their children than under the FCC's current enforcement policy.

II. The Court should not disturb *Red Lion* or *Pacifica*.

Amici further agree with respondents Center for Creative Voices in Media, et al. ("CCV") that the Court need not and should not revisit the long-standing precedents set in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). CCV Br. at 6-8. Affirming the lower court on vagueness grounds would eliminate the need to revisit these cases.

A. Disturbing *Red Lion* could endanger laws and regulations designed to benefit children.

Amici agree with respondents Fox Television Stations, Inc. ("Fox") and CCV that the scarcity doctrine has never been the basis for indecency enforcement. Fox Br. at 36; CCV Br. at 9, 22-28. Accordingly, not only is revisiting *Red Lion* unnecessary, doing so could endanger many FCC policies premised

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[3] *See Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 331 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011).

on *Red Lion*. CCV Br. at 28-37. Of particular concern to *amici* is that disturbing *Red Lion* could serve as an invitation to challenge the Children's Television Act of 1990 ("CTA"), which requires television stations to provide educational programming for children and limit the amount and type of advertising during children's programs.

1. The CTA and the rules implementing it are premised on *Red Lion*.

In *Red Lion*, the Court unanimously upheld the constitutionality of the FCC's authority to license broadcast stations. Because the Court viewed licensing as essential to the productive use of the spectrum, it concluded that granting licenses to some while denying licenses to others did not violate the First Amendment. 395 U.S. at 388-89. The Court reasoned that nothing in the First Amendment prevented the government from requiring a licensee to "to conduct himself as a proxy or fiduciary with obligations" to present the views of others in the community. *Id.* at 389. It added that:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is *the right of the viewers and listeners, not the right of the broadcasters, which is paramount*. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."

Id. at 390 (internal citations omitted) (emphasis added).

Five years after *Red Lion*, in a 1974 policy statement, the FCC spelled out its expectations regarding broadcasters' obligations to serve children. *Children's Television Report and Policy Statement*, 50 F.C.C. 2d 1 (1974), *aff'd sub nom. Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir 1977). The FCC noted that the "landmark decision in *Red Lion* gave considerable support to the principle that the FCC could properly interest itself in program categories." *Id.* at 4. It concluded that language about the paramount First Amendment rights of the viewers "clearly points to a wide range of programming responsibilities on the part of the broadcaster" including "a special obligation to serve children." *Id.* at 5. It also found that "because of their immaturity and their special needs, children require programming specifically designed for them." *Id.*

The 1974 policy statement also set forth broadcasters' responsibilities in advertising to children. Research on child development and psychology found that children lacked the "sophistication or experience needed to understand that advertising is not just another form of informational programming." *Id.* at 15. In response, the FCC urged broadcast stations to voluntarily limit the amount of advertising on children's programs, required that program and commercial content be clearly separated, and prohibited practices such as "host selling" that took unfair advantage of children. *Id.* at 8-18.[4]

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[4] The FCC defines host-selling as "the use of program talent or other identifiable program characteristics to deliver commer-

Congress codified broadcasters' special obligation to children in the Children's Television Act of 1990. Congress found that "it has been clearly demonstrated that television can assist children to learn important information, skills, values, and behavior, while entertaining them and exciting their curiosity to learn about the world around them." Children's Television Act of 1990, Pub. L. No. 101-437 § 101(2) [hereinafter *CTA*]. Congress further found that "as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children." *Id.* Thus, the CTA requires the FCC to "consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee's overall programming" when evaluating the renewal application of any commercial or non-commercial television license. 47 U.S.C. § 303b(a)(2) (2006). The CTA also directed the FCC to adopt rules limiting the number of minutes of commercial time in children's programs (whether or not educational) on both broadcast and cable television. § 303a(a).

When debating the CTA, both the Senate and House Reports closely examined the constitutionality of imposing an affirmative obligation on licensees to serve the special needs of children. The House Report concluded that requiring the FCC to consider children's programming when renewing licenses was "clearly constitutional under tests established in *Red*

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cials' during or adjacent to children's programming featuring that character." *Children's Television Act*, FCC.GOV (last visited Nov. 7, 2011), http://www.fcc.gov/guides/childrens-educational-television.

Lion and subsequent cases." H.R. REP. NO. 101-385, at 11 (1989). Likewise, the Senate Committee concluded that "it is well within the First Amendment strictures to require the FCC to consider, during the license renewal process, whether a television licensee has provided programming specifically designed to serve the educational and informational needs of children in the contexts of its overall programming." S. REP. NO. 101-227, at 16 (1989).

The FCC also relied on *Red Lion* in adopting rules to implement the CTA. For example, in 1996, the FCC adopted a processing guideline for renewing broadcast licenses under which a broadcast station that aired on average three hours per week of children's educational or informational programming would be found to have met its obligations under the CTA. *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10660, 10662 (1996). In rejecting broadcasters' arguments that this guideline violated the First Amendment, the FCC relied on *Red Lion* and subsequent cases. *Id.* at 10729-30.

In 2004, the FCC revised the guideline to account for the fact that when television stations transitioned from analog to digital broadcasting that they would be able to provide additional "multicast" channels of free video programming over existing spectrum. The FCC amended the license renewal processing guidelines so that DTV broadcasters that chose to multicast would be expected to proportionately increase the amount of children's educational programming. *Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd. 22943, 22950 (2004). On reconsideration, the FCC rejected

broadcasters' arguments that the revised guidelines violated the First Amendment, noting that under *Red Lion*, "[i]t is well established that the broadcast media do not enjoy the same level of First Amendment protection as do other media." 21 FCC Rcd. 11065, 11072-73 n.41 (2006).

2. The CTA and underlying FCC rules have benefited children.

The CTA and the regulations implementing it have increased the amount of educational programming available to children. The FCC's review of the processing guidelines three years after implementation found that broadcasters had increased the quantity of children's educational programming and aired, on average, four hours per week from 1997 to 1999. FCC, THREE YEAR REVIEW OF THE IMPLEMENTATION OF THE CHILDREN'S TELEVISION RULES AND GUIDELINES 1997-1999 1 (2001), *available at* http://transition.fcc.gov/mb/policy/cetv.html. A more recent report by the Government Accountability Office found that:

> The amount of core children's programming aired by commercial broadcast stations in the television markets we reviewed increased significantly from 1998 to 2010, with the increases ranging from 73 percent in the smallest market (Butte-Bozeman, Montana), to 477 percent in the largest market (New York, New York). . . . [T]he average weekly hours aired more than doubled for six markets. As a result, viewers of broadcast television in these markets have more educational and informational core children's programming

formational core children's programming available to them.[5]

This same GAO Study found that the FCC actively enforced the children's advertising limits and policies.[6]

Independent studies confirm that increased children's programming benefits the long-term well-being of children. One study by the Corporation for Public Broadcasting found that "kids who watch Sesame Street in preschool spend more time reading

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[5] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-659, CHILDREN'S TELEVISION ACT: FCC COULD IMPROVE EFFORTS TO OVERSEE ENFORCEMENT AND PROVIDE PUBLIC INFORMATION 8 (2011) [hereinafter "GAO Report"]. Many other studies have shown that most broadcasters are meeting or exceeding the FCC's three-hour guideline. *See, e.g.*, BARBARA J. WILSON, ET AL. EDUCATIONALLY/INSUFFICIENT? AN ANALYSIS OF THE AVAILABILITY & EDUCATIONAL QUANTITY OF CHILDREN'S E/I PROGRAMMING 11-12 (2008) (analysis of a stratified sample of stations in 2007 found that stations aired an average of 3.32 hours per week of children's E/I programming); AMY B. JORDAN, IS THE THREE-HOUR RULE LIVING UP TO ITS POTENTIAL? 3 (2000) (noting that broadcast stations offered, on average, 3.4 hours of core education programming per week).

[6] GAO Report, *supra* note 5, at 15. It found that "for the last two renewal cycles in 1996 and 2004, the FCC issued about 7,000 violations to over 600 stations, and assessed civil penalties totaling almost $3 million. Most of these violations were advertising length violations— advertisements aired during children's programming that exceeded 10.5 minutes per hour on weekends or 12 minutes per hour on weekdays. The remaining violations concerned other advertising problems—such as host-selling or failure to create a clear distinction between program content and advertising—or problems with a broadcast station's public inspection file—such as the station not including all the required children's programming documents in the file." *Id.* at 15 (citations omitted).

for pleasure in high school, and they obtain higher grades in English, math, and science." CORPORATION FOR PUBLIC BROADCASTING, FINDINGS FROM READY TO LEARN: 2005-2010 5 (2011). Other programs, such as *Mister Rogers' Neighborhood*, have increased the propensity towards positive behavior and values, including: "sympathy, task persistence, empathy, and imaginativeness." ALETHA C. HUSTON ET. AL., BIG WORLD, SMALL SCREEN 65 (1992).

When the FCC deregulated television in the 1980s, stations aired less educational programming for children and more advertising during children's programs. It was for this reason that Congress passed the CTA. The Senate Report reviewed substantial evidence and concluded that "despite the FCC's contention that market forces should be sufficient to ensure that commercial stations provide educational and informational children's programming, the facts demonstrate otherwise." S. Rep. No. 101-227, at 9. Similarly, the House Commerce Committee found that commercial time during children's broadcasting had increased in the five years since the FCC eliminated the advertising limits and that "total reliance on the market to hold advertising to an acceptable level during children's programming" had led to increased commercialization. H.R. Rep No. 101–385, at 8-9.[7]

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[7] There is a market failure in children's programming because US broadcasting is largely a commercial system that relies on advertising revenue. As the FCC found in adopting the processing guideline, "small audiences with little buying power, such as children's educational television audiences, are unlikely to be able to signal the intensity of their demand for such programming in the broadcasting market." Therefore, broadcasters

3. Disturbing *Red Lion* may result in constitutional challenges to the CTA and FCC rules that benefit children.

If the Court were to disturb *Red Lion*, it could invite constitutional challenges to the CTA or the rules implementing it. To meet strict scrutiny, the government would need to show that its rules are "justified by a compelling government interest and [are] narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)). To do this, the government would have to identify "an actual problem in need of solving" and show that "the curtailment of speech must be actually necessary to the solution." *Id.* at 2738. In *Brown*, the Court found that the government failed to meet this demanding standard because it lacked studies showing that playing violent video games caused minors to act aggressively. *Id.* at 2738-39.

In adopting the processing guidelines in 1996, the FCC concluded that its rules implementing the CTA were "constitutional under the traditional First Amendment standard" applied to the broadcast media. It added: "But even if evaluated under a heightened standard, our rules would pass muster because the interest advanced is compelling and our regulations are narrowly tailored." *Policies and Rules Concerning Children's Television Program-*

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may have to forgo potentially more profitable programming to show children's educational television. *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd. at 10674.

ming, 11 FCC Rcd. at 10732. While *amici* agree with the FCC, the recent *Brown* decision suggests that it is very difficult to make a satisfactory showing that a regulation is narrowly tailored to a compelling interest.

If, for example, the CTA's advertising limits were challenged, the FCC might have difficulty producing sufficient evidence to establish a compelling governmental interest. As this Court noted in *FCC v. Fox Television Stations, Inc.*:

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. . . . Congress has made the determination that indecent material is harmful to children. . . .

129 S. Ct. 1800, 1813 (2009) (citations omitted). While there is empirical research demonstrating that certain advertising techniques are unfair to

children, it is not certain that a court would find a sufficiently strong causal link to satisfy strict scrutiny.[8]

B. Disturbing *Pacifica* is unnecessary and could harm children.

Amici agree with respondents CCV and CBS Television Network Affiliates Association and NBC Television Affiliates ("CBS and NBC Affiliates") that the FCC's indecency enforcement in the present cases is not justified by *Pacifica*. *See, e.g.*, CCV Br. at 10-14; CBS and NBC Affiliates Br. at 32. *Amici* do not agree, however, that the premises underlying *Pacifica*—the pervasiveness of broadcast media and its unique accessibility to children—are no longer valid and that *Pacifica* should be disturbed. *See Pacifica*, 438 U.S. at 748-50.

A substantial number of Americans depend on over-the-air broadcasting. A recent study found that 46 million out of 110 million households relied on over-the-air television broadcasting as their primary means of receiving television programming, up from 42 million households a year earlier. Phil Kurz, *46 Million Americans Still Watch TV Exclusively over the Air, says Report*, BROADCASTENGINERING.COM, http://broadcastengineering.com/ott/americans-still-watch-tv-exclusively-over-the-air-06082011/ (June 08, 2011). Another recent study found that low-income households with children are particularly de-

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[8] *See, e.g.*, DALE KUNKEL & JESSICA CASTONGUAY, *Children in Advertising: Content, Comprehension, and Consequences*, *in* HANDBOOK OF CHILDREN AND THE MEDIA (DOROTHY G. SINGER & JEROME L. SINGER eds., 2011).

pendent on broadcast television. It found that while 98% of children under age eight in households with incomes of $30,000 or less have a television, only 53% have cable, and only 48% have a computer. COMMON SENSE MEDIA, ZERO TO EIGHT: CHILDREN'S MEDIA USE IN AMERICA 20-23 (2011). Thus, broadcast television remains a pervasive and important part of American society that is uniquely accessible to young children. Accordingly, *Pacifica* provides a viable and important basis for the FCC to protect children from daytime broadcasts of repetitive excretory and sexual references.

III. The V-Chip does not provide an effective less-restrictive alternative means for protecting children from inappropriate content.

Should the Court choose to evaluate the FCC's indecency regime under a heightened level of scrutiny, *amici* urge the Court to reject the argument of ABC, Inc. that the V-Chip provides a less speech-restrictive means for protecting children from inappropriate broadcast content. *See, e.g.*, ABC, Inc. Br. at 42. The mere existence of a possible alternative means of accomplishing a government interest is not enough. Rather, the less-restrictive alternative must be "*at least as effective* in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (emphasis added). Experience has shown that the V-Chip and its underlying ratings scheme have not and cannot provide an effective tool for protecting children from inappropriate content.

A. The V-Chip and underlying TV ratings were intended to provide a tool for parents to protect their children from indecent broadcast content.

Section 551 of the Telecommunications Act of 1996 was intended to provide parents "with the technological tools that allow them to easily block violent, sexual, or other programming that they believe harmful to their children." Telecommunications Act of 1996, Pub. L. No. 104-104 § 551(a)(9), 100 Stat. 56 (codified in scattered sections of 47 U.S.C.). To work, section 551's system requires that broadcast video programming be embedded with ratings and that television sets come equipped with a device, known as the V-Chip, capable of decoding those ratings, thus permitting parents to configure the V-Chip in their television to block programming they believe is inappropriate for their children.

More specifically, section 551 required all new television sets with screens 13 inches or larger to be equipped with the V-Chip starting in January 2000. 47 U.S.C. § 303(x) (2006). It provided program distributors a year to develop a voluntary ratings system subject to FCC review. § 551(e)(1)(A).

Several industry trade associations, including the National Association of Broadcasters ("NAB"), the National Cable Television Association ("NCTA") and the Motion Picture Association of America ("MPAA") developed a ratings system that they submitted to the FCC in January 1997. Many parents groups, public health organizations, and members of Congress expressed concerns about the industry proposal because it called only for age-based ratings, and not content-based ratings that would alert par-

ents to the specific type of material they could expect their children to view in a particular program. *Implementation of Section 551*, 13 FCC Rcd. 8232 at ¶ 5 (1998) [hereinafter *Implementation of Section 551*]. Indeed, *amicus* Children Now urged the FCC to reject the industry's original proposal because the ratings did not "tell parents why a program was rated the way it was, preventing parents from making the very decision the Telecommunications Act empowered them to make." Children Now, Comment to *Industry Proposal for Rating Video Programming*, FCC Docket No. 97-55 at 5 (Apr. 8, 1997), http://fjallfoss.fcc.gov/ecfs/document/view?id=1808820001 [hereinafter *Children Now Comment*].

Subsequent negotiations between industry representatives and several children's advocacy groups—including AAP and Children Now—resulted in a revised set of Parental Guidelines filed with the FCC in August 1997. Under the revised guidelines, each program receives one of six ratings based on age as well as any of five applicable content-based descriptors: "V" for "violence," "S" for "sexual situations," "L" for coarse "language," "D" for suggestive "dialogue," and "FV" for "fantasy violence."[9] There are a total of 44 different possible ratings combinations.

The FCC found the revised ratings system acceptable. *Implementation of Section 551*, 13 FCC Rcd. 8232 at ¶ 31 (1998). It based its determination

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[9] The age-based categories are as follows: TV-Y (suitable for all children); TV-Y7 (directed to children age 7 and older); TV-G (general audience); TV-PG (parental guidance suggested); TV-14 (parents strongly cautioned); and TV-MA (mature audience only).

in part on a joint statement of the industry and advocacy groups asking that the FCC "give the rating system a fair chance to work and allow parents an opportunity to understand and use the system." *Id.* at ¶ 32. It also noted that the industry had pledged to "educate the public and parents about the V-Chip and the TV Parental Guideline System [and] encourage publishers of TV periodicals, newspapers and journals to include the ratings with their program listings." *Id.* at Attachment: Agreement on Modifications to the TV Parental Guidelines.

Amici agree that Congress intended the V-Chip to provide a narrowly tailored means of achieving a compelling government interest. ABC, Inc. Br. at 43. Congressman Markey, who sponsored the V-Chip amendment in the House of Representatives, predicted that "[i]n [just] two years there will be 25 million homes with a V-Chip" that "parent[s] can use to protect their children." 141 CONG. REC. H8481-01 (1995) (statement of Rep. Edward Markey). Shortly before passage of the Telecommunications Act in February 1996, President Clinton urged Congress in his State of the Union Address to adopt the V-Chip "so that parents can screen out programs they believe are inappropriate for their children." William Clinton, President of the United States, 1996 State of the Union Address (Jan. 22, 1996).

Children's advocacy groups initially shared this enthusiasm. For example, the AACAP hailed the V-Chip as "an important commitment, by legislators to parents and to child advocates." 141 CONG. REC. S8225-01 (1995) (letter introduced by Sen. Kent Conrad). Children Now noted that the V-Chip had been "[c]hampioned by children's advocates and pol-

icy makers from both sides of the aisle, [and] was destined to forever change the way children view television." *Children Now Comments* at 1.

B. In practice, the V-Chip has not provided parents with an effective tool to protect their children.

Amici disagree with the claim that the V-Chip provides an *effective* alternative. *See, e.g.*, ABC, Inc. Br. at 44. It is true that most households have televisions equipped with V-Chips. *Implementation of the Child Safe Viewing Act*, 24 FCC Rcd. 11413, 11418 (2009) [hereinafter *CSVA Report*] (noting that many households with older TV sets now have V-Chip capability through their DTV converter box). Numerous studies show, however, that parents are not using this tool.

Congressional concern over the effectiveness of the V-Chip and the associated ratings led Congress to pass the Child Safe Viewing Act of 2007 ("CSVA"). The CSVA directed the FCC "to examine the existence, availability and use of parental empowerment tools already in the market." Pub. L. No. 110-452 § 2(a)(3). The Senate Report on the CSVA specifically cited studies finding that the V-Chip was not widely used and that many parents were unaware of its existence. S. REP. NO. 110-268, at 2 (2008).

The FCC's Report to Congress pursuant to the CSVA stated that "[e]vidence of the V-Chip's limited efficacy in facilitating parental supervision of children's exposure to objectionable broadcast content has reinforced the necessity of the Commission's regulation." *CSVA Report*, 24 FCC Rcd. at 11420. The Report summarized numerous studies finding

that the V-Chip was rarely used, that parents lacked a basic understanding of the ratings, and that the ratings are inaccurately applied. *Id.* at 11420-27.

For example, a 2007 study from the Kaiser Family Foundation found that 67% of parents were "interest[ed] in closely monitoring their child's media use," but only 43% of those who had purchased a V-Chip-equipped television since 2000 were even aware that their television contained V-Chip technology. KAISER FAMILY FOUNDATION, PARENTS, CHILDREN, AND MEDIA: A KAISER FAMILY FOUNDATION SURVEY 9 (2007) [hereinafter KAISER 2007]. The same study found that only 16% of parents had utilized the V-Chip, a mere 1% increase since 2004 despite the massive educational campaigns that had taken place in the interim. *Id.* In contrast, 85% of parents with children who play video games are aware of the Entertainment Software Ratings Board ("ESRB") video game ratings system, which was first implemented in 1994, and 65% of parents regularly check a game's rating before making a purchase. ESRB, *ESRB Survey: Parental Awareness, Use & Satisfaction*, ESRB.ORG (last visited Nov. 5, 2011), http://www.esrb.org/about/awareness.jsp.

Additional studies have found that even when parents are aware that they have the V-Chip, they may experience difficulty using it effectively. Programming the V-Chip can be a challenge; one study noted that users must cycle through at least five screens to turn on the V-Chip's functionality and "must move quickly or programming menus disappear." AMY JORDAN & EMORY WOODARD, PARENTS' USE OF THE V-CHIP TO SUPERVISE CHILDREN'S TELEVISION USE 3 (2003). The same study found that "many

mothers who might otherwise have used the V-Chip were frustrated by an inability to get it to work properly," and that only 27% of mothers felt able to block out a specific type of program upon request. *Id.*

Parents also have trouble understanding the ratings system. Studies focusing on parental comprehension of the ratings show that many parents are unaware of or confused about the meaning of the ratings system. The 2007 Kaiser Study found that among parents with children aged 2-6, only three in ten could name any of the ratings used for children's programming. KAISER 2007 at 9. Moreover, 9% of parents mistakenly believed that "FV" denoted that a program was suitable for "family viewing," and only 11% were aware that "FV" actually denoted that a program contained "fantasy violence." *Id.* at 8.

Parents have even less familiarity with the rating system's content-based descriptors. The 2007 Kaiser Study found that only about half of those surveyed understood that "V" indicated "violence," only 36% knew that "S" stood for "sex," and only 2% knew that "D" indicated "suggestive dialogue." *Id.* at 9.

Pediatrics, the official journal of the AAP, recently published the results of three studies of television ratings. One study found that parents were much less familiar with and less likely to use TV ratings than movie or video game ratings. Douglas A. Gentile, et al. *Parents Evaluation of Media Ratings a Decade After the Television Ratings Were Introduced*, 128 Pediatrics 36, 38 (2011). A second study found that only 5% of parents felt that television ratings were always accurate. *Id.* Together, these studies show that parents "do not think the existing ratings accurately provide the information they want

[and] although they want detailed content rating they also want age-based ratings." *Id.* at 42. While parents generally agreed on the types of content they wanted to know about, they lacked consensus on the appropriate ages for different types of content. As a result, age-based ratings "are clearly not going to be perceived as accurate for all, or even most, parents." *Id.*

1. Despite significant promotional efforts, many parents remain unaware of or unable to use the V-Chip and/or do not know what the underlying ratings mean.

Respondent ABC, Inc. claims that a less-restrictive alternative cannot be dismissed solely based on the lack of public use or awareness. ABC, Inc. Br. at 45 (citing *U.S.* v. *Playboy Entertainment Group*, 529 U.S. 803 (2000)). *Playboy*, however, presented a very different set of facts than the present case. *Playboy* concerned the constitutionality of a different section of the Telecommunications Act, section 505, *codified at* 47 U.S.C. § 561 (2006), which required cable channels whose content was "primarily dedicated to sexually oriented programming" to fully scramble their signals to eliminate signal bleed into homes that did not subscribe to those channels. 529 U.S. at 805. The Court held that section 505 was unconstitutional in large part because parents could request that their cable operator block any undesired specific channel from their service, thus providing a less speech-restrictive alternative. Although this alternative was not widely used, the Court found "no evidence that a *well-promoted* voluntary blocking provision would not be capable at least of informing

parents to the problem of signal bleed . . . and about their rights to have the bleed blocked." *Id.* at 805. (emphasis added).

In contrast, the V-Chip has been heavily promoted for over a decade. When the FCC approved the ratings in 1998, it relied on industry promises to promote the V-Chip and ratings to parents. In the following years, both industry and children's advocacy groups made significant efforts to educate the public about the V-Chip. For example, in 1999, the NAB, NCTA and MPAA teamed up with the Kaiser Family Foundation to create the "V-Chip Education Project," which consisted of "a series of PSA's, a booklet with information about the V-Chip, a toll-free phone number and a website." *CSVA Report*, 24 FCC Rcd. at 11438. In 2005, the NCTA, along with Cable in the Classroom, developed the "Control Your TV" initiative, a $250 million campaign designed to inform parents about the V-Chip. CABLE PUTS YOU IN CONTROL, http://controlyourtv.org (last visited Nov. 8, 2011). The following year, several industry associations worked with the Ad Council to launch a $340 million national multi-media campaign called the "TV Boss." *CSVA Report*, 24 FCC Rcd. at 11438. Thus, unlike in *Playboy*, an extensive campaign to promote an alternative has been tried and has failed.

2. The V-Chip's underlying ratings are neither accurately nor consistently applied.

Even if there were greater public awareness of the V-Chip and underlying ratings, the system cannot be effective because the ratings underlying the V-Chip's operation are applied inaccurately and inconsistently. Studies have shown that many programs

are not accurately rated and that a large amount of objectionable content reaches children.[10] For example, one study examined ratings over four years and found more instances of crude language during programs rated TV-PG than in those rated TV-14. Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 4 J.BROAD. & ELEC. MEDIA 554, 567 (2004).

Another study examined 2,757 television shows and found that 79% of the shows contained violence but no V (violence) descriptor rating, 91% contained offensive language but no L (offensive language) rating, and 92% contained sexual content but no S (sexual scenes) rating. DALE KUNKEL ET. AL., *Assessing the Validity of V-Chip Rating Judgments: The Labeling of High-Risk Programs*, *in* THE ALPHABET SOUP OF TELEVISION PROGRAM RATINGS 51-68 (Bradley Greenberg ed., 2001). A third study analyzed 1,332 television shows to determine the risk of harmful effects on youth. It found that the industry-assigned ratings generally did not match the degree of risk.

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[10] It is also important to note that not all categories of programming are rated and therefore not all broadcast programs can be blocked by the V-Chip. Both news and sports programs are not rated. FCC Br. at 51. Further, there is no V-Chip for radio. 93% of people ages 12 and older listen to radio each week. ARBITRON, RADIO TODAY 2011: HOW AMERICA LISTENS TO RADIO 2 (2011). This study found that "teen consumption of radio each week is stronger and getting stronger." *Id.* at 104. On average teens spent between 7 and 10 hours per week listening to radio. *Id.* at 106. The study also found that that peak listening rates occurred between 6am and 10pm. *Id.* This period falls outside of the "safe-harbor period" during which broadcast may air unregulated programming. *See* 47 C.F.R. § 73.3999(b).

For example, more than two-thirds of children's shows with high-risk violent content were rated as TV-Y, the youngest rating, which generally does not include content descriptors. Gentile, 128 PEDIATRICS at 37 (2011). Finally, a survey of parents who use the television ratings system showed that only 52% thought that shows were rated accurately. VICTORIA RIDEOUT, PARENTS MEDIA AND PUBLIC POLICY: A KAISER FAMILY FOUNDATION SURVEY 5 (2004).

Respondent ABC, Inc. asserts that just because some programs are inaccurately rated does not prevent the V-Chip from being an adequate substitute. ABC, Inc. Br. at 47 (citing *Brown*, 131 S. Ct. at 2741 (recognizing that the existence of some "gaps" in effectiveness of video game ratings systems is insufficient to justify a government ban on the sale of video games to minors)). Television ratings, however, are substantially less effective than video game ratings.

Unlike the ESRB, which rates approximately 1,000 video games per year,[11] no single board determines the ratings for all television programs. Having a single ratings body is practically impossible because many more television programs are produced each year than motion pictures or video games. For example, a single network, NBC, *alone* broadcasts 5,000 hours of TV programming each year.[12] As a re-

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[11] *Frequently Asked Questions*, ESRB.ORG (last visited Nov. 5, 2011), ESRB.org/ratings/faq.jsp. In 2010, ESRB rated 1,638 titles. *Id.* Similarly, the MPAA has a single board that reviews and rates 800 to 900 films each year. *Reasons for Movie Ratings: The Classification and Rating Administration*, FILMRATINGS.COM (last visited Nov. 5, 2011), filmratings.com?filratings_CARA/#/about.

[12] *NBC Television Network*, COMCAST.COM (last visited Nov. 3,

sult, each broadcast station is individually responsible for rating the programming it airs. *CSVA Report*, 24 FCC Rcd. at 11425 (*citations omitted*).

The problems inherent in rating large numbers of programs have been exacerbated by the lack of any meaningful oversight of the television rating process. The FCC's approval of the ratings was premised in part on the creation of a Monitoring Board to hear complaints over potentially incorrectly rated programs. *Implementation of Section 551*, 13 FCC Rcd. at ¶ 10. In practice, however, the Board has not effectively served this function. Several *amici* representatives have served on the Board and are unaware of any situation in which the Board has taken action against an incorrectly rated program. And even if the Board did find that a broadcaster incorrectly rated a program, the Board has no authority to alter the rating or sanction the broadcaster.

Dale Kunkel, an expert on children's media, testified before Congress that "[u]nless media ratings can consistently and accurately label the content that poses the greatest risk of harm to children, such systems cannot accomplish much help for parents." *Hearing on Media Ratings Before the S. Comm. On Gov. Affairs*, 107th Cong. (2001) (Statement of Dale Kunkel, Professor, University of California Santa Barbara). Over the last decade, it has become clear that the consistent and accurate application of the ratings, which parents so strongly desire, has failed to become a reality and thus, the V-Chip is not and

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2011),
www.comcast.com/corporate/about/pressroom/NBCUniversal/television.html.

never will be an equally effective alternative to regulation.

CONCLUSION

For the above reasons, *amici* urge the Court to uphold the court of appeals' decision on the narrow vagueness grounds upon which it was decided.

Respectfully submitted,

Angela J. Campbell
Counsel of Record
Blake E. Reid
Institute for Public
Representation
Georgetown Law
600 New Jersey Ave. NW
Washington, DC 20001
202.662.9535
ipr-efiling@law.georgetown.edu

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1293

In The
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF NEITHER PARTY

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
WALTER M. WEBER
JORDAN A. SEKULOW
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Counsel for Amicus Curiae

Library of Congress
Law Library

19

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. BANS ON PUBLIC INDECENCY ARE CONSTITUTIONAL. 3

II. BANS ON BROADCAST INDECENCY ARE ALSO CONSTITUTIONAL. 5

CONCLUSION 6

APPENDIX:

Public Indecency Laws in the Fifty States and Washington, DC 1a

TABLE OF AUTHORITIES

Cases	Page
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)	4
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)	4
City of Pleasant Grove v. Summum, 555 U.S. 460 (2009)	1
Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996)	3, 4, 5
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	3
FCC v. Pacifica Found., 438 U.S. 726 (1978)	4, 5
Hill v. Colorado, 530 U.S. 703 (2000)	1
McConnell v. FEC, 540 U.S. 93 (2003)	1
Roth v. United States, 354 U.S. 476 (1957)	3
Sable Communications v. FCC, 492 U.S. 115 (1989)	5
Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1999)	1

INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court on the side of First Amendment free speech claims. *E.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1999); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. FEC*, 540 U.S. 93 (2003). It has also appeared before this Court resisting specious free speech claims. *E.g.*, *City of Pleasant Grove v. Summum*, 555 U.S. 460 (2009).

The ACLJ stands firmly in support of the protection of children against public indecency. The ACLJ files this brief in support of neither party in an effort to alert this Court to the potential unintended consequences of its ruling in this case upon the traditional governmental power to proscribe public indecency.

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[1]The parties in this case have given blanket consents to the filing of amicus briefs in support of either party or neither party. Consent letters are on file with the Court. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The police power of the state[2] includes the ability to outlaw public indecency, especially where such indecency threatens to reach minors. Prohibitions on public indecency are a constitutionally permissible means of furthering a compelling government interest in protecting children, among other interests.

Broadcast indecency, by virtue of its pervasiveness and accessibility to children, endangers the same interests and is therefore subject to the same prohibition. This conclusion is independent of the question whether broadcast media receives a lesser degree of free speech protection. Accordingly, the media cannot possess a constitutional right to broadcast indecency that would *a fortiori* jeopardize the universal state laws against public indecency.

ARGUMENT

An indecent television broadcast is essentially an indecent public display. Just as a state could prohibit someone from strutting around naked in public, the

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[2]The present case involves restrictions by the federal government, not a state. The federal government does not possess a general police power. Nevertheless, the existence of a state power to ban public indecency is relevant here. Assuming the right to free speech has identical meaning vis-a-vis both federal and state limitations, the existence of a state power to restrict broadcast indecency, consistent with the First Amendment, necessarily implies that such restrictions -- regardless of their governmental source -- do not violate the broadcaster's constitutional right to free speech. This amicus brief does not address the separate question of the federal government's authority to act in this area.

state could forbid someone from strutting around carrying a display -- still or video -- of someone naked. Likewise, a state may forbid companies from broadcasting into people's homes programs depicting someone strutting around naked. Thus, an indecent broadcast is properly subject to government prohibition. This rule is *not* dependent upon any lower standard of review for broadcast media but instead reflects this Court's consistent recognition of the government authority to outlaw public indecency.

I. BANS ON PUBLIC INDECENCY ARE CONSTITUTIONAL.

This Court has long recognized that "public nudity" is "traditionally subject to indecent exposure laws." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975). *See also Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places"). Currently all fifty states and the District of Columbia have laws against public indecency/indecent exposure. *See* Appendix.

This Court has declared that there is a compelling government interest in protesting minors from indecency. *Denver Area Educ. Telecomms. Consortium v. FCC ["DAETC"]*, 518 U.S. 727, 755 (1996) (opinion of Court per Breyer, J., joined by Stevens, O'Connor, Kennedy, Souter, & Ginsburg, JJ.) ("We agree with the Government that protection of children [from indecency] is a 'compelling interest'"); *id.* at 773 (Stevens, J., concurring) ("the Government may have a compelling interest in protecting children from indecent speech on such a pervasive medium [as cable TV]"); *id.* at 779 (O'Connor, J., concurring) (recognizing

a "well-established compelling interest of protecting children from exposure to indecent material"); *id.* at 804 (Kennedy, J., joined by Ginsburg, J.) (acknowledging the "weighty" concern that "[t]he householder should not have to risk that offensive material come into the hands of his children before it can be stopped") (internal editing and quotation marks omitted); *id.* at 806 ("Congress does have . . . a compelling interest in protecting children from indecent speech"); *id.* at 832 (Thomas, J., joined by Rehnquist, C.J., & Scalia, J.) (recognizing "well-established compelling interest" in protecting minors from indecency).

Not surprisingly, then, this Court has upheld the constitutionality of bans on public indecency, even as applied to allegedly expressive nudity. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Such laws rest not just upon "moral disapproval of people appearing in the nude among strangers in public places," *Barnes*, 501 U.S. at 568 (plurality opinion of Rehnquist, C.J., joined by O'Connor & Kennedy, JJ.), but also upon the grave risk of indecent exposure to children -- imperilling the compelling interest noted above. Moreover, even as to adults, the sensory shock of unexpected exposure to another person's private parts, whether in person or by visual display, is like "the first blow" that cannot be cured by then "run[ning] away," *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

II. BANS ON BROADCAST INDECENCY ARE ALSO CONSTITUTIONAL.

Broadcast indecency implicates these same concerns. By definition, "broadcast" media have "a uniquely pervasive presence in the lives of all Americans," *DAETC*, 518 U.S. at 745 (plurality) (quoting *Pacifica*, 438 U.S. at 748). Broadcast media can contain elements that "intrude on the privacy of the home without prior warning," *Sable Communications v. FCC*, 492 U.S. 115, 127 (1989), especially for the viewer who is just tuning in or switching channels. Moreover, broadcast media are "uniquely accessible to children," *id.* (internal quotation marks and citation omitted), who need navigate no passcodes or lockboxes to turn on a TV set.

Indecent broadcasts are thus subject to governmental restriction just like other forms of indecent exposure. Indeed, the instantaneous dispersal of a "wardrobe malfunction" on prime-time TV imposes upon an audience that is orders of magnitude greater than the limited audience of an intoxicated flasher or wandering naturist. Such high-tech broadcasts of indecent exposure are far more likely to reach children and ambush unwilling adults (not to mention contribute to the general degradation of public culture).

In short, the government can disallow public indecency on broadcast TV as well as on city streets. Importantly, this conclusion in no way rests upon any difference in the level of scrutiny between speech in public places and licensed broadcast media. Even if a TV broadcast were to be afforded the same protection as a soapbox orator in a park, laws against indecent exposure would still be constitutional. The orator has

no right to expose himself or herself, even as part of some message about nudity. *Supra* § I. Nor does Fox TV have the right to pipe such an exposure willy-nilly into homes across America.

CONCLUSION

This Court should decide this case in a way that reaffirms, rather than inadvertently undercuts, either directly or by logical implication, the constitutionality of the laws of all fifty states and the District of Columbia (set forth in the Appendix) forbidding indecent exposure.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Walter M. Weber
Jordan A. Sekulow
American Center for
Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

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APPENDIX

APPENDIX
Public Indecency Laws in the Fifty States and Washington D.C.

ALABAMA

Title 13A, Chapter 12, Article 4: Obscenity and Related Offenses

§ 13A-12-130 (Public lewdness)
(a) A person commits the crime of public lewdness if:
(1) He exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act; or
(2) He does any lewd act in a public place which he knows is likely to be observed by others who would be affronted or alarmed.
(b) Public lewdness is a Class C misdemeanor

§ 13A-12-131 (Public display of obscene bumper sticker, sign or writing)
It shall be unlawful for any person to display in public any bumper sticker, sign or writing which depicts obscene language descriptive of sexual or excretory activities. Any person convicted of a violation of this section shall be guilty of a Class C misdemeanor and shall be punished as prescribed by law.

ALASKA

Title 11, Chapter 41, Article 4: Sexual Offenses
Sec. 11.41.460. Indecent exposure in the second degree

(a) An offender commits the crime of indecent exposure in the second degree if the offender knowingly exposes the offender's genitals in the presence of another person with reckless disregard for the offensive, insulting, or frightening effect the act may have.
(b) Indecent exposure in the second degree before a person under 16 years of age is a class A misdemeanor. Indecent exposure in the second degree before a person 16 years of age or older is a class B misdemeanor.

Title 11. Chapter 61. Article 1: Riot, Disorderly Conduct, and Related Offenses

§ 11.61.120 (Harassment in the second degree)
(a) A person commits the crime of harassment in the second degree if, with intent to harass or annoy another person, that person
. . .
(6) publishes or distributes electronic or printed photographs, pictures, or films that show the genitals, anus. or female breast of the other person or show that person engaged in a sexual act.
(b) Harassment in the second degree is a class B misdemeanor.

ARIZONA

Title 13. Chapter 14: Sexual Offenses

§ 13-1402. Indecent exposure; exception; classification
A. A person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present, and the defendant is

reckless about whether the other person, as a reasonable person, would be offended or alarmed by the act.
B. Indecent exposure does not include an act of breast-feeding by a mother.
C. Indecent exposure to a person who is fifteen or more years of age is a class 1 misdemeanor. Indecent exposure to a person who is under fifteen years of age is a class 6 felony.
D. A person who is convicted of a felony violation of this section and who has two or more historical prior felony convictions for a violation of this section or section 13-1403 involving indecent exposure or public sexual indecency to a minor who is under fifteen years of age shall be sentenced to a term of imprisonment as follows:

	Mitigated	Minimum	Presumptive	Maximum
Aggravated	6 years	8 years	10 years	12 years
	15 years			

E. The presumptive term imposed pursuant to subsection D of this section may be mitigated or aggravated pursuant to section 13-701, subsections D and E.

Title 13, Chapter 35: Obscenity

§ 13-3507 (Public display of explicit sexual materials; classification; definitions)
A. It is unlawful for any person knowingly to place explicit sexual material upon public display, or knowingly to fail to take prompt action to remove such a display from property in his possession or under his control after learning of its existence.
B. A person who violates any provision of this section is guilty of a class 6 felony.

C. For the purposes of this section:
1. "Explicit sexual material" means any drawing, photograph, film negative, motion picture, figure, object, novelty device, recording, transcription or any book, leaflet, pamphlet, magazine, booklet or other item, the cover or contents of which depicts human genitalia or depicts or verbally describes nudity, sexual activity, sexual conduct, sexual excitement or sadomasochistic abuse in a way which is harmful to minors. Explicit sexual material does not include any depiction or description which, taken in context, possesses serious educational value for minors or which possesses serious literary, artistic, political or scientific value.
2. "Public display" means the placing of material on or in a billboard, viewing screen, theater marquee, newsstand, display rack, vending machine, window, showcase, display case or similar place so that material within the definition of paragraph 1 of this subsection is easily visible or readily accessible from a public thoroughfare, from the property of others, or in any place where minors are invited as part of the general public.

ARKANSAS

Title 5, Subtitle 2, Chapter 14: Sexual Offenses

§ 5-14-112 (Indecent exposure)
(a) A person commits indecent exposure if, with the purpose to arouse or gratify a sexual desire of himself or herself or of any other person, the person exposes his or her sex organs:
(1) In a public place or in public view; or
(2) Under circumstances in which the person knows the conduct is likely to cause affront or alarm.

(b) (1) Except as provided in subdivisions (b)(2) and (b)(3) of this section, indecent exposure is a Class A misdemeanor.
(2) For a fourth or fifth conviction within ten (10) years of a previous conviction, indecent exposure is a Class D felony.
(3) For a sixth conviction and each successive conviction within ten (10) years of a previous conviction, indecent exposure is a Class C felony.
(c) A woman is not in violation of this section for breastfeeding a child in a public place or any place where other individuals are present.

Title 5, Subtitle 6, Chapter 68: Obscenity

§ 5-68-201 (Exhibition of obscene figures)
(a) Any person publicly exhibiting any obscene figure is guilty of a violation.
(b) Any person convicted under a provision of this section shall be fined in any sum not less than fifty dollars ($50.00) nor more than one hundred dollars ($100).

§ 5-68-204 (Nudism)
(a) As used in this section, "nudism" means the act or acts of a person or persons congregating or gathering with his, her, or their private parts exposed in the presence of one (1) or more persons of the opposite sex as a form of social practice.
(b) The provisions of this section do not apply to the enumerated acts if:
(1) The purpose of the person committing the act or acts is to render medical or surgical treatment or to determine the need for medical or surgical treatment or to cleanse such sexual part, and the person committing the act:

(A) Is a licensed physician, as defined by § 17-80-101, or any such physician of a sister state making a professional call into Arkansas;
(B) Committed the act under the professional direction of any physician described in subdivision (b)(1)(A) of this section; or
(C) Is a nurse duly registered or licensed by the Arkansas State Board of Nursing; or
(2) The persons are married legally one to another.
(c) It is unlawful for any:
(1) Person, club, camp, corporation, partnership, association, or organization to advocate, demonstrate, or promote nudism; or
(2) Person to rent, lease, or otherwise permit his or her land, premises, or buildings to be used for the purpose of advocating, demonstrating, or promoting nudism.
(d) Any person, club, camp, corporation, partnership, association, or organization violating any provision of this section is guilty of a Class A misdemeanor for each offense.
(e) This section does not repeal any existing laws of the State of Arkansas except those in direct conflict with this section but this section is cumulative to the existing laws of the State of Arkansas.

§ 5-68-205 (Public display of obscenity)
(a) (1) As used in this subsection:
(A) "Obscene" means the same as "obscene material" defined by § 5-68-302; and
(B) "Obscenity" means an obscene sticker, painting, decal, emblem, or other device that is or contains an obscene writing, description, photograph, or depiction.
(2) A person commits the offense of publicly displaying an obscenity if the person knowingly

causes an obscenity to be displayed in a manner that is readily visible to the public and the obscenity's content or character is distinguishable by normal vision.
(3) Publicly displaying an obscenity is a Class B misdemeanor.
(b) (1) It is unlawful to publicly display obscene material as defined by § 5-68-302 on any motor vehicle or wearing apparel.
(2) A violation of this subsection is a Class C misdemeanor.

CALIFORNIA

Title 9, Chapter 8: Indecent Exposure, Obscene Exhibitions, and Bawdy and Other Disorderly Houses

§ 314 (Indecent exposure)
Every person who willfully and lewdly, either:
1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,
2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.
Every person who violates subdivision 1 of this section after having entered, without consent, an inhabited dwelling house, or trailer coach as defined in Section 635 of the Vehicle Code, or the inhabited portion of any other building, is punishable by

imprisonment in the state prison, or in the county jail not exceeding one year.
Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison.

COLORADO

Title 18, Article 7, Part 3: Public Indecency

§ 18-7-301 (Public indecency)
(1) Any person who performs any of the following in a public place or where the conduct may reasonably be expected to be viewed by members of the public commits public indecency:
(a) An act of sexual intercourse; or
(b) (Deleted by amendment, L. 2010, (HB 10-1334), ch. 359, p. 1707, § 1, effective August 11, 2010.)
(c) A lewd exposure of an intimate part as defined by section 18-3-401 (2) of the body, not including the genitals, done with intent to arouse or to satisfy the sexual desire of any person; or
(d) A lewd fondling or caress of the body of another person; or
(e) A knowing exposure of the person's genitals to the view of a person under circumstances in which such conduct is likely to cause affront or alarm to the other person.
(2) (a) Except as otherwise provided in paragraph (b) of this subsection (2), public indecency is a class 1 petty offense.
(b) Public indecency as described in paragraph (e) of subsection (1) of this section is a class 1

misdemeanor if the violation is committed subsequent to a conviction for a violation of paragraph (e) of subsection (1) of this section or for a violation of a comparable offense in any other state or in the United States, or for a violation of a comparable municipal ordinance.
(3) (Deleted by amendment, L. 2010, (HB 10-1334), ch. 359, p. 1707, § 1, effective August 11, 2010.)

§ 18-7-302 (Indecent exposure)
(1) A person commits indecent exposure:
(a) If he or she knowingly exposes his or her genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person with the intent to arouse or to satisfy the sexual desire of any person;
(b) If he or she knowingly performs an act of masturbation in a manner which exposes the act to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person.
(2) (a) (Deleted by amendment, L. 2003, p. 1435, § 31, effective July 1, 2003.)
(b) Indecent exposure is a class 1 misdemeanor.
(3) (Deleted by amendment, L. 2002, p. 1587, § 21, effective July 1, 2002.)
(4) Indecent exposure is a class 6 felony if the violation is committed subsequent to two prior convictions of a violation of this section or of a violation of a comparable offense in any other state or in the United States, or of a violation of a comparable municipal ordinance.
(5) For purposes of this section, "masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own genitals or pubic area for the purpose of sexual gratification or

arousal of the person, regardless of whether the genitals or pubic area is exposed or covered.

CONNECTICUT

Title 53a, Chapter 952, Part XVI: Loitering In or About School Grounds, Public Indecency

§ 53a-186 (Public indecency: Class B misdemeanor)
(a) A person is guilty of public indecency when he performs any of the following acts in a public place:
(1) An act of sexual intercourse as defined in subdivision (2) of section 53a-65; or
(2) a lewd exposure of the body with intent to arouse or to satisfy the sexual desire of the person; or
(3) a lewd fondling or caress of the body of another person. For the purposes of this section, "public place" means any place where the conduct may reasonably be expected to be viewed by others.
(b) Public indecency is a class B misdemeanor.

DELAWARE

Title 11, Part 1, Chapter 5, Subchapter VII, Subpart B: Offenses Involving Public Indecency

§ 1341 (Lewdness; class B misdemeanor)
A person is guilty of lewdness when the person does any lewd act in any public place or any lewd act which the person knows is likely to be observed by others who would be affronted or alarmed.
Lewdness is a class B misdemeanor.

Title 11, Part 1, Chapter 5, Subchapter VII, Subpart C: Obscenity

§ 1366 (Outdoor motion picture theaters)
(a) Whoever being the owner or operator of an outdoor motion picture theater exhibits or permits to be exhibited any film not suitable for minors or harmful to minors and which film can be viewed by such minors not in attendance at the said outdoor motion picture theater shall be guilty of a class A misdemeanor.
(b) Definitions as used in this section:
(1) "Code and Rating Administration of the Motion Picture Association of America" ratings are:
"G" -- All ages admitted. General audiences;
"PG" -- All ages admitted. Parental guidance suggested;
"R" -- Restricted. Under 17 requires accompanying parent or adult guardian;
"X" -- No one under 17 admitted.
(2) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.
(3) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse which predominately appeals to the prurient, shameful or morbid interest of minors and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and taken as a whole the work lacks serious literary, artistical, political or scientific value for minors.
(4) "Minor" means any person under the age of 17 years.
(5) "Not suitable for minors" means any film, reel or view which has a rating of "R" or "X" according to the

Code and Rating Administration of the Motion Picture Association of America.
(6) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state.
(7) "Sado-masochistic abuse" means flagellation or torture practiced by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
(8) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's unclothed genitals or pubic area or a female person's breast.
(9) "Sexual excitement" means the condition of human male or female genitals in a state of sexual stimulation or arousal.
(10) "Suitable for minors" means any film, reel or view which has a rating of "G" or "PG" according to the Code and Rating Administration of the Motion Picture Association of America.

FLORIDA

Title 46, Chapter 800: Lewdness and Indecent Exposure

§ 800.03 (Exposure of sexual organs)
It is unlawful to expose or exhibit one's sexual organs in public or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or

to be naked in public except in any place provided or set apart for that purpose. Violation of this section is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A mother's breastfeeding of her baby does not under any circumstance violate this section.

§ 800.04 (Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age)

. . .

(7) Lewd or lascivious exhibition.

(a) A person who:

1. Intentionally masturbates;

2. Intentionally exposes the genitals in a lewd or lascivious manner; or

3. Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity in the presence of a victim who is less than 16 years of age.

commits lewd or lascivious exhibition.

(b) An offender 18 years of age or older who commits a lewd or lascivious exhibition commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) An offender less than 18 years of age who commits a lewd or lascivious exhibition commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(8) Exception. --A mother's breastfeeding of her baby does not under any circumstance constitute a violation of this section.

GEORGIA

Title 16, Chapter 6: Sexual Offenses

§ 16-6-8 (Public indecency)
(a) A person commits the offense of public indecency when he or she performs any of the following acts in a public place:
(1) An act of sexual intercourse;
(2) A lewd exposure of the sexual organs;
(3) A lewd appearance in a state of partial or complete nudity; or
(4) A lewd caress or indecent fondling of the body of another person.
(b) A person convicted of the offense of public indecency as provided in subsection (a) of this Code section shall be punished as for a misdemeanor except as provided in subsection (c) of this Code section.
(c) Upon a third or subsequent conviction for public indecency for the violation of paragraph (2), (3), or (4) of subsection (a) of this Code section, a person shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.
(d) For the purposes of this Code section only, "public place" shall include jails and penal and correctional institutions of the state and its political subdivisions.
(e) This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules, and regulations of state and local authorities or agencies and local ordinances prohibiting such activities which are more restrictive than this Code section.

HAWAII

Division 5. Title 37, Chapter 712, Part II: Offenses Related to Obscenity

§ 712-1211 (Displaying indecent matter)
(1) A person commits the offense of displaying indecent matter if the person knowingly or recklessly displays on any sign, billboard, or other object visible from any street, highway, or public sidewalk, a photograph, drawing, sculpture, or similar visual representation of any person of the age of puberty or older:
(a) Which reveals the person with less than a fully opaque covering over his or her genitals, pubic area, or buttocks, or depicting the person in a state of sexual excitement or engaged in an act of sexual conduct or sadomasochistic abuse; and
(b) Which is presented in such a manner as to exploit lust; and
(c) Which lacks serious literary, artistic, political, or scientific value.
(2) Displaying indecent material is a petty misdemeanor.

§ 712-1217 (Open lewdness)
(1) A person commits the offense of open lewdness if in a public place the person does any lewd act which is likely to be observed by others who would be affronted or alarmed.
(2) Open lewdness is a petty misdemeanor.

IDAHO

Title 18, Chapter 41: Indecency and Obscenity

§ 18-4116 (Indecent exposure)
Every person who willfully and lewdly, either:
(1) Exposes his or her genitals, in any public place, or in any place where there is present another person or persons who are offended or annoyed thereby; or,
(2) Procures, counsels, or assists any person so to expose his or her genitals, where there is present another person or persons who are offended or annoyed thereby is guilty of a misdemeanor.
Any person who pleads guilty to or is found guilty of a violation of subsection (1) or (2) of this section or a similar statute in another state or any local jurisdiction for a second time within five (5) years, notwithstanding the form of the judgment(s) or withheld judgment(s), is guilty of a felony and shall be imprisoned in the state prison for a period not to exceed ten (10) years.

ILLINOIS

Chapter 720, Title B, Part III, Article 10A, Subdivision 25: Other Offenses

§ 720 ILCS 5/11-30 (As renumbered and amended by P.A. 96-1551, effective July 1, 2011) (Public indecency)
(a) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency:
(1) An act of sexual penetration or sexual conduct; or
(2) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person. Breast-feeding of infants is not an act of public indecency.
(b) "Public place" for purposes of this Section means

any place where the conduct may reasonably be expected to be viewed by others.
(c) Sentence. Public indecency is a Class A misdemeanor. A person convicted of a third or subsequent violation for public indecency is guilty of a Class 4 felony. Public indecency is a Class 4 felony if committed by a person 18 years of age or older who is on or within 500 feet of elementary or secondary school grounds when children are present on the grounds.

INDIANA

Title 35, Article 45: Offenses Against Public Health, Order and Decency

§ 35-45-4-1 (Public indecency -- Indecent exposure)
(a) A person who knowingly or intentionally, in a public place:
(1) engages in sexual intercourse;
(2) engages in deviate sexual conduct:
(3) appears in a state of nudity with the intent to arouse the sexual desires of the person or another person: or
(4) fondles the person's genitals or the genitals of another person; commits public indecency, a Class A misdemeanor.
(b) A person at least eighteen (18) years of age who knowingly or intentionally, in a public place, appears in a state of nudity with the intent to be seen by a child less than sixteen (16) years of age commits public indecency, a Class A misdemeanor.
(c) However, the offense under subsection (a) or subsection (b) is a Class D felony if the person who commits the offense has a prior unrelated conviction:
(1) under subsection (a) or (b): or

(2) in another jurisdiction, including a military court, that is substantially equivalent to an offense described in subsection (a) or (b).
(d) As used in this section, "nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.
(e) A person who, in a place other than a public place, with the intent to be seen by persons other than invitees and occupants of that place:
(1) engages in sexual intercourse;
(2) engages in deviate sexual conduct;
(3) fondles the person's genitals or the genitals of another person; or
(4) appears in a state of nudity; where the person can be seen by persons other than invitees and occupants of that place commits indecent exposure, a Class C misdemeanor.

IOWA

Title XVI, Subtitle 1, Chapter 709: Sexual Abuse

709.9 Indecent exposure
A person who exposes the person's genitals or pubes to another not the person's spouse, or who commits a sex act in the presence of or view of a third person, commits a serious misdemeanor, if:
1. The person does so to arouse or satisfy the sexual desires of either party; and
2. The person knows or reasonably should know that the act is offensive to the viewer.

§ 728.5 (Public indecent exposure in certain establishments)

1. An owner, manager, or person who exercises direct control over a place of business required to obtain a sales tax permit shall be guilty of a serious misdemeanor under any of the following circumstances:

a. If such person allows or permits the actual or simulated public performance of any sex act upon or in such place of business.

b. If such person allows or permits the exposure of the genitals or buttocks or female breast of any person who acts as a waiter or waitress.

c. If such person allows or permits the exposure of the genitals or female breast nipple of any person who acts as an entertainer, whether or not the owner of the place of business in which the activity is performed employs or pays any compensation to such person to perform such activity.

d. If such person allows or permits any person to remain in or upon the place of business who exposes to public view the person's genitals, pubic hair, or anus.

e. If such person advertises that any activity prohibited by this section is allowed or permitted in such place of business.

f. If such person allows or permits a minor to engage in or otherwise perform in a live act intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.

2. However, if such person allows or permits a minor to participate in any act included in subsection 1, paragraphs "a" through "d", the person shall be guilty of an aggravated misdemeanor.

3. Except for subsection 1, paragraph "f", the provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances.

KANSAS

Chapter 21, Article 35: Sex Offenses

21-3508 Lewd and lascivious behavior
(a) Lewd and lascivious behavior is
(1) Publicly engaging in otherwise lawful sexual intercourse or sodomy with knowledge or reasonable anticipation that the participants are being viewed by others; or
(2) publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another.
(b) (1) Lewd and lascivious behavior if committed in the presence of a person 16 or
more years of age is a class B nonperson misdemeanor.
(2) Lewd and lascivious behavior if committed in the presence of a person under 16 years of age is a severity level 9, person felony.

Chapter 21, Article 64: Crimes Against the Public Morals

§ 21-6402 (Promotion to minors of material harmful

to minors)
(a) No person having custody, control or supervision of any commercial establishment shall knowingly:
(1) Display any material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material or device;
(2) present or distribute to a minor, or otherwise allow a minor to view, with or without consideration, any material which is harmful to minors; or
(3) present to a minor, or participate in presenting to a minor, with or without consideration, any performance which is harmful to a minor.
(b) Violation of this section is a class B nonperson misdemeanor.
(c) Notwithstanding the provisions of section 15, and amendments
thereto, to the contrary, it shall be an affirmative defense to any prosecution under this section that:
. . . .
(d) As used in this section:
(1) "Blinder rack" means a device in which material is displayed in such a manner that the lower 2?3 of the material is not exposed to view;
(2) "harmful to minors" means that quality of any description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement or sadomasochistic abuse when the material or performance, taken as a whole or, with respect to a prosecution for an act described by subsection (a)(1), that portion of the material that was actually exposed to the view of minors, has the following characteristics:
(A) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to

appeal to a prurient interest in sex to minors;
(B) the average adult person applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and
(C) a reasonable person would find that the material or performance lacks serious literary, scientific, educational, artistic or political value for minors;
(3) "material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image. description, motion picture film, record, recording tape or video tape;
(4) "minor" means any unmarried person under 18 years of age;
(5) "nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering; the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernible state of sexual excitement;
(6) "performance" means any motion picture, file, video tape, played record, phonograph, tape recording, preview, trailer, play, show, skit, dance or other exhibition performed or presented to or before an audience of one or more, with or without consideration;
(7) "sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, in a mask or bizarre costume or in the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed;
(8) "sexual conduct" means acts of masturbation,

homosexuality, sexual intercourse or physical contact with a person's clothed or unclothed genitals or pubic area or buttocks or with a human female's breast; and
(9) "sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

KENTUCKY

Title L, Chapter 510: Sexual Offenses

510.148. Indecent exposure in the first degree
(1) A person is guilty of indecent exposure in the first degree when he intentionally exposes his genitals under circumstances in which he knows or should know that his conduct is likely to cause affront or alarm to a person under the age of eighteen (18) years.
(2) Indecent exposure in the first degree is a:
(a) Class B misdemeanor for the first offense;
(b) Class A misdemeanor for the second offense, if it was committed within three (3) years of the first conviction;
(c) Class D felony for the third offense, if it was committed within three (3) years of the second conviction; and
(d) Class D felony for any subsequent offense, if it was committed within three (3) years of the prior conviction.

510.150. Indecent exposure in the second degree
(1) A person is guilty of indecent exposure in the second degree when he intentionally exposes his genitals under circumstances in which he knows or should know that his conduct is likely to cause

affront or alarm to a person eighteen (18) years of age or older.
(2) Indecent exposure in the second degree is a Class B misdemeanor.

LOUISIANA

Title 14, Chapter 1: Offenses Affecting the General Peace and Order

§ 14:106 (Obscenity)
A. The crime of obscenity is the intentional:
(1) Exposure of the genitals, pubic hair, anus, vulva, or female breast nipples in any public place or place open to the public view, or in any prison or jail, with the intent of arousing sexual desire or which appeals to prurient interest or is patently offensive.
. . . .
G. (1) On a first conviction, whoever commits the crime of obscenity shall be fined not less than one thousand dollars nor more than two thousand five hundred dollars, or imprisoned, with or without hard labor, for not less than six months nor more than three years, or both.
(2) (a) On a second conviction, the offender shall be imprisoned, with or without hard labor for not less than six months nor more than three years, and in addition may be fined not less than two thousand five hundred dollars nor more than five thousand dollars.
(b) The imprisonment provided for in Subparagraph (a), may be imposed at court discretion if the court determines that the offender, due to his employment, could not avoid engagement in the offense. This Subparagraph (b) shall not apply to the manager or other person in charge of an establishment selling or

exhibiting obscene material.
(3) On a third or subsequent conviction, the offender shall be imprisoned with or without hard labor for not less than two years nor more than five years, and in addition may be fined not less than five thousand dollars nor more than ten thousand dollars.
(4) When a violation of Paragraph (1), (2), or (3) of Subsection A of this Section is with or in the presence of an unmarried person under the age of seventeen years, the offender shall be fined not more than ten thousand dollars and shall be imprisoned, with or without hard labor, for not less than two years nor more than five years, without benefit of parole, probation, or suspension of sentence.
H. (1) When a corporation is charged with violating this Section, the corporation, the president, the vice president, the secretary, and the treasurer may all be named as defendants. Upon conviction for a violation of this Section, a corporation shall be sentenced in accordance with Subsection G hereof. All corporate officers who are named as defendants shall be subject to the penalty provisions of this Section as set forth in Subsection G.

MAINE

Title 17A, Part 2, Chapter 35: Prostitution and Public Indecency

§ 854 Indecent conduct
1. A person is guilty of indecent conduct if:
A. In a public place:
1) The actor engages in a sexual act, as defined in section 251. Violation of this subparagraph is a Class E crime;

2) The actor knowingly exposes the actor's genitals under circumstances that in fact are likely to cause affront or alarm. Violation of this subparagraph is a Class E crime;

3) The actor violates subparagraph (1) and the actor has 2 or more prior convictions for any combination of the following: violating this section or section 256 or for engaging in substantially similar conduct to that of the Maine offenses listed in this subparagraph in another jurisdiction. Section 9-A governs the use of prior convictions when determining a sentence. Violation of this subparagraph is a Class D crime; or

4) The actor violates subparagraph (2) and the actor has 2 or more prior convictions for any combination of the following: violating this section or section 256 or for engaging in substantially similar conduct to that of the Maine offenses listed in this subparagraph in another jurisdiction. Section 9-A governs the use of prior convictions when determining a sentence. Violation of this subparagraph is a Class D crime;

B. In a private place, the actor exposes the actor's genitals with the intent that the actor be seen from a public place or from another private place. Violation of this paragraph is a Class E crime;

C. In a private place, the actor exposes the actor's genitals with the intent that the actor be seen by another person in that private place under circumstances that the actor knows are likely to cause affront or alarm. Violation of this paragraph is a Class E crime;

D. The actor violates paragraph B and the actor has 2 or more prior convictions for any combination of the following: violating this section or section 256 or for engaging in substantially similar conduct to that

of the Maine offenses listed in this paragraph in another jurisdiction. Section 9-A governs the use of prior convictions when determining a sentence. Violation of this paragraph is a Class D crime; or

E. The actor violates paragraph C and the actor has 2 or more prior convictions for any combination of the following: violating this section or section 256 or for engaging in substantially similar conduct to that of the Maine offenses listed in this paragraph in another jurisdiction. Section 9-A governs the use of prior convictions when determining a sentence. Violation of this paragraph is a Class D crime.

2. For purposes of this section "public place" includes, but is not limited to, motor vehicles that are on a public way.

2-A. It is a defense to prosecution under subsection 1, paragraph C, that the other person previously lived or currently is living in the same household as the actor.

MARYLAND

Title 11, Subtitle 1: Adult Sexual Displays and Related Crimes

§ 11-107. Indecent exposure

A person convicted of indecent exposure is guilty of a misdemeanor and is subject to imprisonment not exceeding 3 years or a fine not exceeding $ 1,000 or both.

MASSACHUSETTS

Part IV, Title I, Chapter 272: Crimes Against Chastity, Morality, Decency and Good Order

§ 53. Common Night Walkers, Disorderly Persons and Disturbers of the Peace.
(a) Common night walkers, common street walkers, both male and female, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, keepers of noisy and disorderly houses, and persons guilty of indecent exposure shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than $200, or by both such fine and imprisonment.
(b) Disorderly persons and disturbers of the peace, for the first offense, shall be punished by a fine of not more than $150. On a second or subsequent offense, such person shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than $200, or by both such fine and imprisonment.

MICHIGAN

Chapter 117: Home Rule Cities

117.5h. Regulation of prohibition of public nudity; "public nudity" defined
Sec. 5h. (1) Whether or not so provided in its charter, a city may, by ordinance, regulate or prohibit public nudity within city boundaries.
(2) As used in this section, "public nudity" means knowingly or intentionally displaying in a public place, or for payment or promise of payment by any person including, but not limited to, payment or promise of payment of an admission fee, any individual's genitals or anus with less than a fully opaque covering, or a female individual's breast with

less than a fully opaque covering of the nipple and areola. A mother's breastfeeding of her baby does not under any circumstances constitute nudity irrespective of whether or not the nipple is covered during or incidental to the feeding.

Chapter 750, Chapter XXVIII: Disorderly Persons

§ 750.167. "Disorderly person" defined; subsequent violations by person convicted of refusing or neglecting to support family.
Sec. 167. (1) A person is a disorderly person if the person is any of the following:

. . .

(f) A person who is engaged in indecent or obscene conduct in a public place.

. . .

Chapter 750, Chapter XLVIII: Indecency and Immorality

§ 750.335a. Indecent exposure; violation; penalty
(1) A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another .
(2) A person who violates subsection (1) is guilty of a crime, as follows:
(a) Except as provided in subdivision (b) or (c), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.
(b) If the person was fondling his or her genitals, pubic area, buttocks, or, if the person is female, breasts, while violating subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of

not more than $2,000.00, or both.
(c) If the person was at the time of the violation a sexually delinquent person, the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life .

MINNESOTA

Chapter 617: Abortion; Obscenity; Nuisance

617.23 Indecent Exposure: Penalties
Subdivision 1. Misdemeanor. A person who commits any of the following acts in any public place, or in any place where others are present, is guilty of a misdemeanor:
(1) willfully and lewdly exposes the person's body, or the private parts thereof;
(2) procures another to expose private parts; or
(3) engages in any open or gross lewdness or lascivious behavior, or any public indecency other than behavior specified in this subdivision.
Subd. 2. Gross misdemeanor. A person who commits any of the following acts is guilty of a gross misdemeanor:
(1) the person violates subdivision 1 in the presence of a minor under the age of 16; or
(2) the person violates subdivision 1 after having been previously convicted of violating subdivision 1, sections 609.342 to 609.3451, or a statute from another state in conformity with any of those sections.
Subd. 3. Felony. A person is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both, if:

(1) the person violates subdivision 2, clause (1), after having been previously convicted of or adjudicated delinquent for violating subdivision 2, clause (1); section 609.3451, subdivision 1, clause (2); or a statute from another state in conformity with subdivision 2, clause (1), or section 609.3451, subdivision 1, clause (2); or
(2) the person commits a violation of subdivision 1, clause (1), in the presence of another person while intentionally confining that person or otherwise intentionally restricting that person's freedom to move.
Subd. 4. Breast-feeding. It is not a violation of this section for a woman to breast-feed.

MISSISSIPPI

Title 97: Crimes, Chapter 29: Crimes Against Public Morals and Decency, In General

§ 97-29-31. Indecent exposure
A person who willfully and lewdly exposes his person, or private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, is guilty of a misdemeanor and, on conviction, shall be punished by a fine not exceeding Five Hundred Dollars ($ 500.00) or be imprisoned not exceeding six (6) months, or both. It is not a violation of this statute for a woman to breast-feed.

§ 97-29-47. Profanity or drunkenness in public place
If any person shall profanely swear or curse, or use vulgar and indecent language, or be drunk in any public place, in the presence of two (2) or more persons, he shall, on conviction thereof, be fined not

more than one hundred dollars ($ 100.00) or be imprisoned in the county jail not more than thirty (30) days or both.

Title 97, Chapter 35: Crimes Against Public Peace and Safety

§ 97-35-11. Disturbance by abusive language or indecent exposure; exception
Any person who enters the dwelling house of another, or the yard or curtilage thereof, or upon the public highway, or any other place near such premises, and in the presence or hearing of the family or the possessor or occupant thereof, or of any member thereof, makes use of abusive, profane, vulgar or indecent language, or is guilty of any indecent exposure of his or her person at such place, shall be punished for a misdemeanor. The act of breast-feeding shall not constitute indecent exposure.

MISSOURI

Title 38, Chapter 566: Sexual Offenses

§ 566.083. Sexual misconduct involving a child, penalty -- applicability of section -- affirmative defense not allowed, when
1. A person commits the crime of sexual misconduct involving a child if the person:
(1) Knowingly exposes his or her genitals to a child less than fifteen years of age under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm to the child;
(2) Knowingly exposes his or her genitals to a child less than fifteen years of age for the purpose of

arousing or gratifying the sexual desire of any person, including the child; or
(3) Knowingly coerces or induces a child less than fifteen years of age to expose the child's genitals for the purpose of arousing or gratifying the sexual desire of any person, including the child.
2. The provisions of this section shall apply regardless of whether the person violates the section in person or via the Internet or other electronic means.
3. It is not an affirmative defense to prosecution for a violation of this section that the other person was a peace officer masquerading as a minor.
4. Sexual misconduct involving a child or attempted sexual misconduct involving a child is a class D felony unless the actor has previously pleaded guilty to or been found guilty of an offense pursuant to this chapter or the actor has previously pleaded guilty to or has been convicted of an offense against the laws of another state or jurisdiction which would constitute an offense under this chapter, in which case it is a class C felony.

§ 566.093. Sexual misconduct, second degree, penalties
1. A person commits the crime of sexual misconduct in the second degree if such person:
(1) Exposes his or her genitals under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm;
(2) Has sexual contact in the presence of a third person or persons under circumstances in which he or she knows that such conduct is likely to cause affront or alarm; or
(3) Has sexual intercourse or deviate sexual intercourse in a public place in the presence of a

third person.
2. Sexual misconduct in the second degree is a class B misdemeanor unless the actor has previously been convicted of an offense under this chapter, in which case it is a class A misdemeanor.

Title 38, Chapter 573: Pornography and Related Offenses

§ 573.060. Public display of explicit sexual material
1. A person commits the crime of public display of explicit sexual material if he knowingly or recklessly:
(1) Displays publicly explicit sexual material; or
(2) Fails to take prompt action to remove such a display from property in his possession after learning of its existence.
2. Public display of explicit sexual material is a class A misdemeanor unless the person has pleaded guilty to or has been found guilty of an offense under this section committed at a different time, in which case it is a class D felony.
3. For purposes of this section, each day there is a violation of this section shall constitute a separate offense.

MONTANA

Title 45, Chapter 5, Part 5: Sexual Crimes

45-5-504 Indecent exposure
(1) A person commits the offense of indecent exposure if the person knowingly or purposely exposes the person's genitals under circumstances in which the person knows the conduct is likely to cause affront or alarm in order to:

(a) abuse, humiliate, harass, or degrade another; or
(b) arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person.
(2) (a) A person convicted of the offense of indecent exposure shall be fined an amount not to exceed $ 500 or be imprisoned in the county jail for a term of not more than 6 months, or both.
(b) On a second conviction, the person shall be fined an amount not to exceed $ 1,000 or be imprisoned in the county jail for a term of not more than 1 year, or both.
(c) On a third or subsequent conviction, the person shall be punished by life imprisonment or by imprisonment in a state prison for a term of not less than 5 years or more than 100 years and may be fined not more than $ 10,000.

NEBRASKA

Chapter 28: Crimes and Punishments, Article 8: Offenses Relating to Morals

§ 28-806. Public indecency; penalty
(1) A person, eighteen years of age or over, commits public indecency if such person performs or procures, or assists any other person to perform, in a public place and where the conduct may reasonably be expected to be viewed by members of the public:
(a) An act of sexual penetration; or
(b) An exposure of the genitals of the body done with intent to affront or alarm any person; or
(c) A lewd fondling or caressing of the body of another person of the same or opposite sex.
(2) Public indecency is a Class II misdemeanor.

NEVADA

Title 15, Chapter 201: Crimes Against Public Decency and Good Morals, Lewdness and Indecent Exposure

201.210. Open or gross lewdness; penalty
1. A person who commits any act of open or gross lewdness is guilty:
(a) For the first offense, of a gross misdemeanor.
(b) For any subsequent offense, of a category D felony and shall be punished as provided in NRS 193.130.
2. For the purposes of this section, the breast feeding of a child by the mother of the child does not constitute an act of open or gross lewdness.

201.220. Indecent or obscene exposure; penalty
1. A person who makes any open and indecent or obscene exposure of his or her person, or of the person of another, is guilty:
(a) For the first offense, of a gross misdemeanor.
(b) For any subsequent offense, of a category D felony and shall be punished as provided in NRS 193.130.
2. For the purposes of this section, the breast feeding of a child by the mother of the child does not constitute an act of open and indecent or obscene exposure of her body.

NEW HAMPSHIRE

Title LXII, Chapter 645: Public Indecency

645:1 Indecent Exposure and Lewdness
I. A person is guilty of a misdemeanor if such person

fornicates, exposes his or her genitals, or performs any other act of gross lewdness under circumstances which he or she should know will likely cause affront or alarm.
II. A person is guilty of a class B felony if:
(a) Such person purposely performs any act of sexual penetration or sexual contact on himself or herself or another in the presence of a child who is less than 16 years of age.
(b) Such person purposely transmits to a child who is less than 16 years of age, or an individual whom the actor reasonably believes is a child who is less than 16 years of age, an image of himself or herself fornicating, exposing his or her genitals, or performing any other act of gross lewdness.
(c) Having previously been convicted of an offense under paragraph I, or of an offense that includes the same conduct under any other jurisdiction, the person subsequently commits an offense under paragraph I.
III. A person shall be guilty of a class A felony if having previously been convicted of 2 or more offenses under paragraph II, or a reasonably equivalent statute in another state, the person subsequently commits an offense under this section.

NEW JERSEY

Title 2C, Subtitle 2, Part 1, Chapter 14: Sexual Offenses

§ 2C:14-4. Lewdness
a. A person commits a disorderly persons offense if he does any flagrantly lewd and offensive act which he knows or reasonably expects is likely to be observed by other nonconsenting persons who would

be affronted or alarmed.
b. A person commits a crime of the fourth degree if:
(1) He exposes his intimate parts for the purpose of arousing or gratifying the sexual desire of the actor or of any other person under circumstances where the actor knows or reasonably expects he is likely to be observed by a child who is less than 13 years of age where the actor is at least four years older than the child.
(2) He exposes his intimate parts for the purpose of arousing or gratifying the sexual desire of the actor or of any other person under circumstances where the actor knows or reasonably expects he is likely to be observed by a person who because of mental disease or defect is unable to understand the sexual nature of the actor's conduct.
c. As used in this section: "lewd acts" shall include the exposing of the genitals for the purpose of arousing or gratifying the sexual desire of the actor or of any other person.

Title 2C, Subtitle 2, Part 5, Chapter 33: Riot; Disorderly Conduct

§ 2C:33-2. Disorderly conduct

. . .

b. Offensive language. A person is guilty of a petty disorderly persons offense if, in a public place, and with purpose to offend the sensibilities of a hearer or in reckless disregard of the probability of so doing, he addresses unreasonably loud and offensively coarse or abusive language, given the circumstances of the person present and the setting of the utterance, to any person present.
"Public" means affecting or likely to affect persons in a place to which the public or a substantial group

has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

NEW MEXICO

Chapter 30, Article 9: Sexual Offenses

§ 30-9-14. Indecent exposure
A. Indecent exposure consists of a person knowingly and intentionally exposing his primary genital area to public view.
B. As used in this section, "primary genital area" means the mons pubis, penis, testicles, mons veneris, vulva or vagina.
C. Whoever commits indecent exposure is guilty of a misdemeanor.
D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted for committing indecent exposure to participate in and complete a program of professional counseling at his own expense.

NEW YORK

Penal Law, Part Three, Title N, Article 245: Offenses Against Public Sensibilities

§ 245.00. Public lewdness
A person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or

from other private premises, and with intent that he be so observed. Public lewdness is a class B misdemeanor.

§ 245.01. Exposure of a person

A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

Exposure of a person is a violation.

Nothing in this section shall prevent the adoption by a city, town or village of a local law prohibiting exposure of a person as herein defined in a public place, at any time, whether or not such person is entertaining or performing in a play, exhibition, show or entertainment.

§ 245.02. Promoting the exposure of a person

A person is guilty of promoting the exposure of a person when he knowingly conducts, maintains, owns, manages, operates or furnishes any public premise or place where a person in a public place appears in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

Promoting the exposure of a person is a violation.

Nothing in this section shall prevent the adoption by a city, town or village of a local law prohibiting the exposure of a person substantially as herein defined in a public place, at any time, whether or not such person is entertaining or performing in a play, exhibition, show or entertainment.

§ 245.10. Public display of offensive sexual material; definitions of terms

The following definitions are applicable to section 245.11:

1. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

2. "Sexual conduct" means an act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

3. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizzare costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

4. "Transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations and all appurtenances thereto.

§ 245.11. Public display of offensive sexual material

A person is guilty of public display of offensive sexual material when, with knowledge of its character and content, he displays or permits to be displayed in or on any window, showcase, newsstand, display rack, wall, door, billboard, display board, viewing screen, moving picture screen, marquee or similar place, in such manner that the display is easily visible from or in any: public street, sidewalk or thoroughfare; transportation facility; or any place accessible to members of the public without fee or other limit or condition of admission such as a minimum age requirement and including but not limited to schools, places of amusement, parks and playgrounds but excluding rooms or apartments designed for actual residence; any pictorial, three-dimensional or other visual representation of a person or a portion of the human body that predominantly appeals to prurient interest in sex, and that:

(a) depicts nudity, or actual or simulated sexual conduct or sado-masochistic abuse; or

(b) depicts or appears to depict nudity, or actual or simulated sexual conduct or sado-masochistic abuse, with the area of the male or female subject's unclothed or apparently unclothed genitals, pubic area or buttocks, or of the female subject's unclothed or apparently unclothed breast, obscured by a covering or mark placed or printed on or in front of the material displayed, or obscured or altered in any other manner.

Public display of offensive sexual material is a Class A misdemeanor.

NORTH CAROLINA

Chapter 14, Subchapter 07, Article 26: Offenses Against Public Morality and Decency

§ 14-190.9. Indecent exposure

(a) Unless the conduct is punishable under subsection (a1) of this section, any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, except for those places designated for a public purpose where the same sex exposure is incidental to a permitted activity, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a Class 2 misdemeanor.

(a1) Unless the conduct is prohibited by another law providing greater punishment, any person at least 18 years of age who shall willfully expose the private parts of his or her person in any public place in the presence of any other person less than 16 years of age for the purpose of arousing or gratifying sexual desire shall be guilty of a Class H felony. An offense committed under this subsection shall not be considered to be a lesser included offense under G.S. 14-202.1.

(b) Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the

breast feeding.
(c) Notwithstanding any other provision of law, a local government may regulate the location and operation of sexually oriented businesses. Such local regulation may restrict or prohibit nude, seminude, or topless dancing to the extent consistent with the constitutional protection afforded free speech.

NORTH DAKOTA

Title 12.1, Chapter 12.1-20: Sex Offenses

12.1-20-12.1. Indecent exposure
1. A person, with intent to arouse, appeal to, or gratify that person's lust, passions, or sexual desires, is guilty of a class A misdemeanor if that person:
a. Masturbates in a public place or in the presence of a minor; or
b. Exposes one's penis, vulva, or anus in a public place or to a minor in a public or private place.
2. A person is guilty of a class C felony if the person violates subsection 1 after a previous conviction for violating subsection 1, after a previous conviction for violating section 12.1-20-12.2, or after being required to register under section 12.1-32-15.
3. A person who commits a violation of subsection 1 within fifty feet [15.24 meters] of or on the real property comprising a public or nonpublic elementary, middle, or high school is guilty of a class C felony. A person who commits a violation of subsection 2 within fifty feet [15.24 meters] of or on the real property comprising a public or nonpublic elementary, middle, or high school is guilty of a class B felony.
4. The act of a woman discreetly breastfeeding her child is not a violation of this section.

OHIO

Title 29, Chapter 2907: Sex Offenses

§ 2907.09. Public indecency

(A) No person shall recklessly do any of the following, under circumstances in which the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not members of the person's household:

(1) Expose the person's private parts;

(2) Engage in sexual conduct or masturbation;

(3) Engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation.

(B) No person shall knowingly do any of the following, under circumstances in which the person's conduct is likely to be viewed by and affront another person who is a minor, who is not the spouse of the offender, and who resides in the person's household:

(1) Engage in masturbation;

(2) Engage in sexual conduct;

(3) Engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation;

(4) Expose the person's private parts with the purpose of personal sexual arousal or gratification or to lure the minor into sexual activity.

(C)(1) Whoever violates this section is guilty of public indecency and shall be punished as provided in divisions (C)(2), (3), (4), and (5) of this section.

(2) Except as otherwise provided in division (C)(2) of this section, a violation of division (A)(1) of this section is a misdemeanor of the fourth degree. If the offender previously has been convicted of or pleaded guilty to one violation of this section, a violation of

division (A)(1) of this section is a misdemeanor of the third degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a misdemeanor of the second degree. If the offender previously has been convicted of or pleaded guilty to two violations of this section, a violation of division (A)(1) of this section is a misdemeanor of the second degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to three or more violations of this section, a violation of division (A)(1) of this section is a misdemeanor of the first degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a felony of the fifth degree.

(3) Except as otherwise provided in division (C)(3) of this section, a violation of division (A)(2) or (3) of this section is a misdemeanor of the third degree. If the offender previously has been convicted of or pleaded guilty to one violation of this section, a violation of division (A)(2) or (3) of this section is a misdemeanor of the second degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to two or more violations of this section, a violation of division (A)(2) or (3) of this section is a misdemeanor of the first degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a felony of the fifth degree.

(4) Except as otherwise provided in division (C)(4) of this section, a violation of division (B)(1), (2), or (3) of this section is a misdemeanor of the second degree. If

the offender previously has been convicted of or pleaded guilty to one violation of this section, a violation of division (B)(1), (2), or (3) of this section is a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to two or more violations of this section, a violation of division (B)(1), (2), or (3) of this section is a felony of the fifth degree.
(5) Except as otherwise provided in division (C)(5) of this section, a violation of division (B)(4) of this section is a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to any violation of this section, a violation of division (B)(4) of this section is a felony of the fifth degree.

OKLAHOMA

Title 21, Part 1, Chapter 2: General Provisions

§ 22. Gross injuries--Grossly disturbing peace--Openly outraging public decency--Injurious acts not expressly forbidden
Every person who willfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, including but not limited to urination in a public place, and is injurious to public morals, although no punishment is expressly prescribed therefor by this code, is guilty of a misdemeanor.

Title 21, Part IV, Chapter 36: Crimes Against Religion and Conscience

§ 906. Obscene language a misdemeanor, when

If any person shall utter or speak any obscene or lascivious language or word in any public place, or in the presence of females, or in the presence of children under ten (10) years of age, he shall be liable to a fine of not more than One Hundred Dollars ($100.00), or imprisonment for not more than thirty (30) days, or both.

Title 21, Part IV, Chapter 39: Oklahoma Law on Obscenity and Child Pornography

§ 1040.52. Showing of specified actual or simulated sexual activity and nudity at certain outdoor theaters prohibited--Penalty

A. Every owner or operator of an outdoor theater in this state is guilty of a misdemeanor who shows or causes to be shown a motion picture depicting:

1. Any person, whether nude or clad, in an act or simulation of an act of sexual intercourse, unnatural copulation or other sexual activity including the showing of human genitals in a state of sexual stimulation or arousal, acts of human masturbation, or fondling or other erotic touching of human genitals, pubic region, buttock or female breast; or

2. Nude or partially denuded figures including less than completely and opaquely covered human genitals, pubic regions, buttock and female breast below a point immediately above the top of the areola and including human male genitals in a discernibly turgid state, even if completely and opaquely covered.

B. This section shall be applicable, however, only where the viewing portion of the screen of such theater is situated within the view of any residence or where children under eighteen (18) years of age have an understanding view of the picture.

C. Any prosecution under this section must be preceded by a written complaint from a resident affected by the terms of this act.
D. Upon conviction of a violation of this section such person shall be imprisoned in the county jail for not more than one (1) year, or fined not more than One Thousand Dollars ($ 1,000.00), or be both so imprisoned and fined.

OREGON

Title 16, Chapter 163: Offenses Against Persons

163.465 Public indecency
(1) A person commits the crime of public indecency if while in, or in view of, a public place the person performs:
(a) An act of sexual intercourse;
(b) An act of deviate sexual intercourse; or
(c) An act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person.
(2) (a) Public indecency is a Class A misdemeanor.
(b) Notwithstanding paragraph (a) of this subsection, public indecency is a Class C felony if the person has a prior conviction for public indecency or a crime described in ORS 163.355 to 163.445 or for a crime in another jurisdiction that, if committed in this state, would constitute public indecency or a crime described in ORS 163.355 to 163.445.

Title 16, Chapter 167: Offenses Against Public Health, Decency , and Animals

167.060 Definitions for ORS 167.060 to 167.095
As used in ORS 167.060 to 167.095, unless the

context requires otherwise:
(1) "Advertising purposes" means purposes of propagandizing in connection with the commercial sale of a product or type of product, the commercial offering of a service, or the commercial exhibition of an entertainment.
(2) "Displays publicly" means the exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a public thoroughfare, depot or vehicle.

. . .

(5) "Nudity" means uncovered, or less than opaquely covered, post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered human male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and areola only are covered.

. . .

167.090 Publicly displaying nudity or sex for advertising purposes
(1) A person commits the crime of publicly displaying nudity or sex for advertising purposes if, for advertising purposes, the person knowingly:
(a) Displays publicly or causes to be displayed publicly a picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts nudity, sadomasochistic abuse, sexual conduct or sexual excitement, or any page, poster or other written or printed matter bearing such representation or a

verbal description or narrative account of such items or activities, or any obscenities; or
(b) Permits any display described in this section on premises owned, rented or operated by the person.
(2) Publicly displaying nudity or sex for advertising purposes is a Class A misdemeanor.

PENNSYLVANIA

Title 18, Part II, Article B, Chapter 31, Subchapter B: Definition of Offenses

§ 3127. Indecent exposure
(a) Offense defined. --A person commits indecent exposure if that person exposes his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm.
(b) Grading. --If the person knows or should have known that any of the persons present are less than 16 years of age, indecent exposure under subsection (a) is a misdemeanor of the first degree. Otherwise, indecent exposure under subsection (a) is a misdemeanor of the second degree.

Title 18, Part II, Article F, Chapter 59: Public Indecency

§ 5901. Open lewdness
A person commits a misdemeanor of the third degree if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.

Title 18, Part II, Article F, Chapter 55: Riot,

Disorderly Conduct, and Related Offenses

§ 5503. Disorderly conduct
(a) Offense defined. --A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

. . .

(3) uses obscene language, or makes an obscene gesture; or

. . .

(b) Grading. --An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.
(c) Definition. --As used in this section the word "public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public.

RHODE ISLAND

Title 11, Chapter 31: Obscene and Objectionable Publications and Shows

§ 11-31-10. Sale or exhibition to minors of indecent publications, pictures, or articles
(a) Every person who shall willfully or knowingly engage in the business of selling, lending, giving away, showing, advertising for sale, or distributing

to any person under the age of eighteen (18) years, has in his or her possession with intent to engage in that business or to otherwise offer for sale or commercial distribution to any person under the age of eighteen (18) years, or who shall display at newsstands or any other business establishment frequented by persons under the age of eighteen (18) years or where persons under the age of eighteen (18) years are or may be invited as a part of the general public, any motion picture, any still picture, photograph, or any book, pocket book, pamphlet, or magazine of which the cover or content consists of explicit representations of "sexual conduct", "sexual excitement", "nudity" and which is indecent for minors or which is predominantly made up of descriptions of "sexual conduct", "sexual excitement", "nudity" and which is indecent, shall, upon conviction, be punished by a fine of not less than one hundred dollars ($ 100) nor more than one thousand dollars ($ 1,000), or by imprisonment for not more than two (2) years, or both.

(b) As used in this section, the following words have the following meaning:

(1) "Indecent for minors" means:

(i) Appealing to the prurient interest in sex of minors;

(ii) Patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors; and

(iii) Lacking serious literary, artistic, political, or scientific value for minors;

(2) "Knowingly" means having knowledge of the character and content of the publication or failure on notice to exercise reasonable inspection which would disclose its content and character;

(3) "Nudity" means less than completely and

opaquely covered; human genitals, pubic regions, buttock, and female breast below a point immediately above the top of the areola;
(4) "Sexual conduct" means act of human masturbation, sexual intercourse, sodomy, fondling, or other erotic touching of human genitals, pubic region, buttock, or female breasts; and
(5) "Sexual excitement" means human genitals in a state of sexual stimulation or arousal.

Title 11, Chapter 45: Disorderly Conduct

§ 11-45-2. Indecent exposure -- Disorderly conduct
(a) A person commits indecent exposure/disorderly conduct when for the purpose of sexual arousal, gratification or stimulation, such person intentionally, knowingly, or recklessly:
(1) Exposes his or her genitals to the view of another under circumstances in which his or her conduct is likely to cause affront, distress, or alarm to that person;
(b) Any person may be a complainant for the purposes of instituting action for any violation of this section. This act shall not apply to any conduct between consenting adults where the complainant is an unintended witness;
(c) Any person found guilty of, or who pleads nolo contendere to the crime of indecent exposure/disorderly conduct, shall be imprisoned for a term of not more than one year, or fined not more than one thousand dollars ($ 1,000), or both. Any subsequent offense shall be punished by imprisonment for a term of up to three (3) years;
(d) Counseling. Every person convicted of, or placed on probation for a violation of this section, may be ordered to attend appropriate professional

counseling to address his or her behavior;
(e) In no event shall the provisions of this section be construed to apply to breastfeeding in public.

SOUTH CAROLINA

Title 16, Chapter 15, Article 1: Miscellaneous Offenses

§ 16-15-130. Indecent exposure; breastfeeding.
(A) (1) It is unlawful for a person to willfully, maliciously, and indecently expose his person in a public place, on property of others, or to the view of any person on a street or highway.
(2) This subsection does not apply to a woman who breastfeeds her own child in a public place, on property of others, to the view of any person on a street or highway, or any other place where a woman and her child are authorized to be.
(B) A person who violates the provisions of subsection (A)(1) is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both.

Title 16, Chapter 15, Article 3: Obscenity, Material Harmful to Minors, Child Exploitation, and Child Prostitution

§ 16-15-365. Exposure of private parts in lewd and lascivious manner, aiding or procuring person to perform such act, or permitting use of premises for such act prohibited; penalties.
Any person who willfully and knowingly exposes the private parts of his person in a lewd and lascivious manner and in the presence of any other person, or

aids or abets any such act, or who procures another to perform such act, or any person, who as owner, manager, lessee, director, promoter, or agent, or in any other capacity knowingly hires, leases, or permits the land, building, or premises of which he is owner, lessee, or tenant, or over which he has control, to be used for purposes of any such act, is guilty of a misdemeanor and, upon conviction, must be imprisoned for not more than six months or fined not more than five hundred dollars, or both.

SOUTH DAKOTA

Title 9, Chapter 9-29: General Police Powers

§ 9-29-9. Prohibit obscene or immoral materials
Every municipality shall have power to prohibit the sale or exhibition of any obscene or immoral publication, print, film, picture, or illustration.

Title 22, Chapter 22-24: Obscenity and Public Indecency

§ 22-24-1.1. "Public indecency" defined -- Penalty
A person commits the crime of public indecency if the person, under circumstances in which that person knows that his or her conduct is likely to annoy, offend, or alarm some other person, exposes his or her anus or genitals in a public place where another may be present who will be annoyed, offended, or alarmed by the person's act. A violation of this section is a Class 2 misdemeanor.

§ 22-24-1.2. Indecent exposure -- Penalty
A person commits the crime of indecent exposure if, with the intent to arouse or gratify the sexual desire

of any person, the person exposes his or her genitals in a public place, or in the view of a public place, under circumstances in which that person knows that person's conduct is likely to annoy, offend, or alarm another person. A violation of this section is a Class 1 misdemeanor. However, if such person has been previously convicted of a felony violation of § 22-22-1, 22-22-7, or 22-24A-3, that person is guilty of a Class 6 felony. Any person convicted of a third or subsequent violation of this section is guilty of a Class 6 felony.

TENNESSEE

Title 39, Chapter 13, Part 5: Sexual Offenses

39-13-511. Public indecency -- Indecent exposure.
(a) (1) (A) A person commits the offense of public indecency who, in a public place, as defined in subdivision (a)(2)(B), knowingly or intentionally:
(i) Engages in sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions or other ultimate sex acts;
(ii) Appears in a state of nudity; or
(iii) Fondles the genitals of the person, or another person.
(B) A person does not violate subdivision (a)(1)(A) if the person makes intentional and reasonable attempts to conceal the person from public view while performing an excretory function, and the person performs the function in an unincorporated area of the state.
(2) As used in subdivision (a)(1):
(A) "Nudity" or "state of nudity" means the showing of the bare human male or female genitals or pubic

area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of the areola, or the showing of the covered male genitals in a discernibly turgid state. "Nudity" or "state of nudity" does not include a mother in the act of nursing the mother's baby; and

(B) (i) "Public place" means any location frequented by the public, or where the
public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. "Public place" includes, but is not limited to, streets, sidewalks, parks, beaches, business and commercial establishments, whether for profit or not-for-profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement, bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal or similar organizations.

(ii) Premises used solely as a private residence, whether permanent or temporary in nature, are not deemed to be a public place. "Public place" does not include enclosed single sex public restrooms, enclosed single sex functional showers, locker or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctors' offices, portions of hospitals and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor does it include a person appearing in a state of nudity in a modeling class operated by a proprietary school, licensed by the state of Tennessee, a college, junior college, or university supported entirely or partly by taxation,

or a private college or university where such private college or university maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation or an accredited private college. "Public place" does not include a private facility that has been formed as a family-oriented clothing optional facility, properly licensed by the state.

(3) Public indecency is punishable as follows:

(A) A first or second offense is a Class B misdemeanor punishable only by a fine of five hundred dollars ($500); and

(B) A third or subsequent offense is a Class A misdemeanor punishable by a fine of one thousand five hundred dollars ($1,500) or confinement for not more than eleven (11) months and twenty-nine (29) days, or both.

(4) (A) If a person is arrested for public indecency while working as an employee or a contractor, the employer or principal may be held liable for a fine imposed by subdivision (a)(3).

(B) The employer may not be held liable under this section, unless it is shown the employer knew or should have known the acts of the employee or contractor were in violation of this section.

(5) This subsection (a) does not apply to any theatrical production that contains nudity as defined by this section, performed in a theater by a professional or amateur theatrical or musical company that has serious artistic merit; provided, that the production is not in violation of chapter 17, part 9 of this title.

(6) This subsection (a) shall not affect in any fashion the ability of local jurisdictions or the state of Tennessee to regulate any activity where alcoholic

beverages, including malt beverages, are sold for consumption.

(b) (1) A person commits the offense of indecent exposure who:

(A) In a public place, as defined in § 39-11-106, or on the private premises of another, or so near thereto as to be seen from the private premises:

(i) Intentionally:

(a) Exposes the person's genitals or buttocks to another; or

(b) Engages in sexual contact or sexual penetration as defined in § 39-13-501; and

(ii) Reasonably expects that the acts will be viewed by another and the acts:

(a) Will offend an ordinary viewer; or

(b) Are for the purpose of sexual arousal and gratification of the defendant; or

(B) (i) Knowingly invites, entices or fraudulently induces the child of another

into the person's residence for the purpose of attaining sexual arousal or gratification by intentionally engaging in the following conduct in the presence of the child:

(a) Exposure of such person's genitals, buttocks or female breasts; or

(b) Masturbation.

(ii) Knowingly engages in the person's own residence, in the intended presence of any child, for the defendant's sexual arousal or gratification the following intentional conduct:

(a) Exposure of the person's genitals, buttocks or female breasts; or

(b) Masturbation.

(iii) No prosecution shall be commenced for a violation of subdivision (b)(1)(B)(ii)(a) based solely upon the uncorroborated testimony of a witness who

shares with the accused any of the relationships described in § 36-3-601(5).
(iv) For the provisions of subdivision (b)(1)(B)(i) or (b)(1)(B)(ii) to apply, the defendant must be eighteen (18) years of age or older and the child victim must be less than thirteen (13) years of age.
(2) "Indecent exposure," as defined in subdivision (b)(1), is a Class B misdemeanor, unless the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, in which event, indecent exposure is a Class A misdemeanor. Additionally, "indecent exposure," as defined in subdivision (b)(1), is a Class E felony when the defendant is eighteen (18) years of age or older, the victim is under thirteen (13) years of age, and the defendant has any combination of two (2) or more prior convictions under this section.
(c) (1) A person confined in a penal institution, as defined in § 39-16-601, commits the offense of indecent exposure who with the intent to abuse, torment, harass or embarrass a guard:
(A) Intentionally exposes the person's genitals or buttocks to the guard; or
(B) Engages in sexual contact as defined in § 39-13-501.
(2) For purposes of this subsection (c), "guard" means any sheriff, jailer, guard, correctional officer or other authorized personnel charged with the custody of the person.
(3) Notwithstanding subdivision (b)(2), a violation of this subsection (c) is a Class A misdemeanor.
(d) This section does not apply to a mother who is breastfeeding her child who is twelve (12) months of age or younger in any location, public or private.

TEXAS

Title 9, Chapter 42: Disorderly Conduct and Related Offenses

§ 42.01. Disorderly Conduct
(a) A person commits an offense if he intentionally or knowingly:
(1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;
(2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace;
. . .
(10) exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act; or
. . .
(c) For purposes of this section:
(1) an act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near a private residence; .. .
(d) An offense under this section is a Class C misdemeanor unless committed under Subsection (a)(7) or (a)(8), in which event it is a Class B misdemeanor.
(e) It is a defense to prosecution for an offense under Subsection (a)(7) or (9) that the person who discharged the firearm had a reasonable fear of bodily injury to the person or to another by a dangerous wild animal as defined by Section 822.101, Health and Safety Code.

UTAH

Title 76, Chapter 9, Part 7: Miscellaneous Provisions

§ 76-9-702. Lewdness -- Sexual battery -- Public urination

(1) A person is guilty of lewdness if the person under circumstances not amounting to rape, object rape, forcible sodomy, forcible sexual abuse, aggravated sexual assault, or an attempt to commit any of these offenses, performs any of the following acts in a public place or under circumstances which the person should know will likely cause affront or alarm to, on, or in the presence of another who is 14 years of age or older:

(a) an act of sexual intercourse or sodomy;

(b) exposes his or her genitals, the female breast below the top of the areola, the buttocks, the anus, or the pubic area;

(c) masturbates; or

(d) any other act of lewdness.

(2) (a) A person convicted the first or second time of a violation of Subsection (1) is guilty of a class B misdemeanor, except under Subsection (2)(b).

(b) A person convicted of a violation of Subsection (1) is guilty of a third degree felony if at the time of the violation:

(i) the person is a sex offender as defined in Section 77-27-21.7;

(ii) the person has been previously convicted two or more times of violating Subsection (1); or

(iii) the person has previously been convicted of a violation of Subsection (1) and has also previously been convicted of a violation of Section 76-9-702.5.

(3) A person is guilty of sexual battery if the person under circumstances not amounting to rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, aggravated sexual assault, or an attempt to commit any of these offenses intentionally touches, whether or not through clothing, the anus, buttocks, or any part of the genitals of another person, or the breast of a female, and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched.
(4) Sexual battery is a class A misdemeanor.

Title 76, Chapter 10, Part 12: Pornographic and Harmful Materials and Performances

§ 76-10-1227. Indecent public displays -- Definitions
(1) For purposes of this section and Section 76-10-1228:
(a) "Description or depiction of illicit sex or sexual immorality" means:
(i) human genitals in a state of sexual stimulation or arousal;
(ii) acts of human masturbation, sexual intercourse, or sodomy;
(iii) fondling or other erotic touching of human genitals or pubic region; or
(iv) fondling or other erotic touching of the human buttock or female breast.
(b) "Nude or partially denuded figure" means:
(i) less than completely and opaquely covering human:
(A) genitals;
(B) pubic regions;
(C) buttock; and

(D) female breast below a point immediately above the top of the areola; and
(ii) human male genitals in a discernibly turgid state, even if completely and opaquely covered.
(2) (a) Subject to Subsection (2)(c), this section and Section 76-10-1228 do not apply to any material which, when taken as a whole, has serious value for minors.
(b) As used in Subsection (2)(a), "serious value" means having serious literary, artistic, political, or scientific value for minors, taking into consideration the ages of all minors who could be exposed to the material.
(c) A description or depiction of illicit sex or sexual immorality as defined in Subsection (1)(a)(i), (ii), or (iii) has no serious value for minors.

§ 76-10-1228. Indecent public displays -- Prohibitions -- Penalty
(1) Subject to the affirmative defense in Subsection 76-10-1208(3), a person is guilty of a class A misdemeanor who willfully or knowingly:
(a) engages in the business of selling, lending, giving away, showing, advertising for sale, or distributing to a minor or has in the person's possession with intent to engage in that business or to otherwise offer for sale or commercial distribution to a minor any material with:
(i) a description or depiction of illicit sex or sexual immorality; or
(ii) a nude or partially denuded figure; or
(b) publicly displays at newsstands or any other establishment frequented by minors, or where the minors are or may be invited as a part of the general public, any motion picture, or any live, taped, or recorded performance, or any still picture or

photograph, or any book, pocket book, pamphlet, or magazine the cover or content of which:
(i) exploits, is devoted to, or is principally made up of one or more descriptions or depictions of illicit sex or sexual immorality; or
(ii) consists of one or more pictures of nude or partially denuded figures.
(2) (a) A violation of this section is punishable by:
(i) a minimum mandatory fine of not less than $ 500; and
(ii) incarceration, without suspension of sentence in any way, for a term of not less than 30 days.
(b) This section supersedes Section 77-18-1.

§ 76-10-1229. Distribution of pornographic material through cable television prohibited -- Definitions -- Prosecution of violation
(1) No person, including a franchisee, shall knowingly distribute by wire or cable any pornographic or indecent material to its subscribers.
(2) For purposes of this section "material" means any visual display shown on a cable television system, whether or not accompanied by sound, or any sound recording played on a cable television system.
(3) For purposes of this section "pornographic material" is any material defined as pornographic in Sections 76-10-1201 and 76-10-1203.
(4) For purposes of this section "indecent material" means any material described in Section 76-10-1227.
(5) For purposes of this section "distribute" means to send, transmit, retransmit, or otherwise pass through a cable television system.
(6) Prosecution for violation of this section may be initiated at the instance of the attorney general or any county or city attorney of an interested political subdivision or at the instance of the governing body

of any such political subdivision.
(7) Any person who violates this section is guilty of a class A misdemeanor.

VERMONT

Title 13, Chapter 59, Subchapter 1: Lewd and Indecent Conduct

§ 2601. Lewd and lascivious conduct
A person guilty of open and gross lewdness and lascivious behavior shall be imprisoned not more than five years or fined not more than $ 300.00, or both.

Title 13, Part 1, Chapter 63: Obscenity

§ 2801. Definitions
As used in this act:
(1) "Minor" means any person less than 18 years old.
(2) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.
(3) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.
(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
(5) "Sado-masochistic abuse" means flagellation or

torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
(6) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
(A) Predominantly appeals to the prurient, shameful or morbid interest of minors; and
(B) Is patently offensive to prevailing standards in the adult community in the state of Vermont as a whole with respect to what is suitable material for minors; and
(C) Is taken as a whole, lacks serious literary, artistic, political, or scientific value, for minors.
(7) "Advertising purposes" means purposes of propagandizing in connection with the commercial sale of a product or type of product, the commercial offering of a service, or the commercial exhibition of an entertainment.
(8) "Displays publicly" means the exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway, sidewalk, or lobby of a building which has unrestricted access by the public.

§ 2802. Disseminating indecent material to a minor in the presence of the minor
(a) No person may, with knowledge of its character and content, sell, lend, distribute or give away to a minor:
(1) Any picture, photograph, drawing, sculpture,

motion picture film, or similar visual representation or image, including any such representation or image which is stored electronically, of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in subdivision (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

(b) No person may, with knowledge of the character and content of a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors:

(1) Exhibit such a motion picture, show or other presentation to a minor; or

(2) Sell or give away to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such a motion picture, show or other presentation; or

(3) Admit a minor to premises whereon there is exhibited or to be exhibited such a motion picture, show or other presentation.

(c) This section shall apply only to acts occurring in the presence of the minor.

§ 2804. Exhibition of motion pictures

No person may, with knowledge of the character and content, exhibit a motion picture, show or other presentation, harmful to minors as defined in subdivision 2801(6) of this title, which in whole or

part depicts nudity and sexual conduct, as defined in section 2801, such that it may be viewed by minors from public property or private property not under the control of the person exhibiting the motion picture, show or other presentation.

§ 2804a. Publicly displaying sex or nudity for advertising purposes

No person may knowingly, publicly display nudity or sex for advertising purposes. A violation of this section occurs if a person:

(1) Displays publicly or causes to be displayed publicly for advertising purposes a picture, photograph, drawing, sculpture or other visual representation or image, including any such representation or image which is communicated, transmitted, or stored electronically, of a person or portion of the human body that depicts nudity, sado-masochistic abuse, sexual conduct or sexual excitement, which is harmful to minors, or any page, poster or other written or printed matter bearing such representation or a verbal description or narrative account of such items or activities; or

(2) Permits any public display described in this section on premises owned, rented or operated by him or her; or

(3) For advertising purposes, purchases space in any newspaper, magazine or other circular, printed in this state, in order to insert any article or advertisement which contains material harmful to minors.

§ 2805. Presumption and defense

(a) A person who engages in conduct prohibited by section 2802, 2802a, 2803, 2804, 2804a, or 2804b of this title is presumed to do so with knowledge of the

character and content of the material, or the motion picture, show or presentation exhibited or to be exhibited.

(b) In any prosecution arising under section 2802, 2802a, 2803, or 2804 of this title, it is an affirmative defense:

(1) That the minor as to whom the offense is alleged to have been committed exhibited to the accused a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that the minor was 18 years of age or older; or

(2) That the defendant was in a parental or guardianship relationship with the minor; or that the minor was accompanied by a parent or legal guardian; or

(3) That the defendant was a bona fide school, museum or public library, or was a person acting in the course of employment as an employee or official of such organization or of a retail outlet affiliated with and serving the educational purpose of such organization.

(c) In any prosecution arising out of sections 2804a and 2804b of this title, it shall be an affirmative defense for the defendant to prove:

(1) That the public display, even though in connection with a commercial venture, was primarily for literary, political, scientific or artistic purposes; or

(2) That the public display was exhibited by a bona fide art, antique or similar gallery or exhibition, and visible in a normal display setting; or

(3) That the defendant was a bona fide school, museum, or public library, or was a person acting in the course of employment as an employee or official of such organization or of a retail outlet affiliated

with and serving the educational purpose of such organization.

VIRGINIA

Title 18.2, Chapter 8, Article 5: Obscenity and Related Offenses

§ 18.2-387. Indecent exposure
Every person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor. No person shall be deemed to be in violation of this section for breastfeeding a child in any public place or any place where others are present.

§ 18.2-388. Profane swearing and intoxication in public; penalty; transportation of public inebriates to detoxification center
If any person profanely curses or swears or is intoxicated in public, whether such intoxication results from alcohol, narcotic drug or other intoxicant or drug of whatever nature, he shall be deemed guilty of a Class 4 misdemeanor. In any area in which there is located a court-approved detoxification center a law-enforcement officer may authorize the transportation, by police or otherwise, of public inebriates to such detoxification center in lieu of arrest; however, no person shall be involuntarily detained in such center.

WASHINGTON

Title 9A, Chapter 9A.88: Indecent Exposure-Prostitution

§ 9A.88.010. Indecent exposure
(1) A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm. The act of breastfeeding or expressing breast milk is not indecent exposure.
(2) (a) Except as provided in (b) and (c) of this subsection, indecent exposure is a misdemeanor.
(b) Indecent exposure is a gross misdemeanor on the first offense if the person exposes himself or herself to a person under the age of fourteen years.
(c) Indecent exposure is a class C felony if the person has previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030.

WASHINGTON D.C.

Division IV, Title 22, Subtitle 1, Chapter 13: Disturbances of the Public Peace

§ 22-1312. Lewd, indecent, or obscene acts; sexual proposal to a minor [Formerly § 22-1112]
It is unlawful for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus, to engage in masturbation, or to engage in a sexual act as defined in § 22-3001(8). It is unlawful for a person to make an obscene or indecent sexual proposal to a minor. A person who violates any provision of this section shall be guilty of a

misdemeanor and, upon conviction, shall be fined not more than $ 500, imprisoned for not more than 90 days, or both.

WEST VIRGINIA

Chapter 61, Article 8: Crimes Against Chastity, Morality and Decency

§ 61-8-9. Indecent exposure
(a) A person is guilty of indecent exposure when such person intentionally exposes his or her sex organs or anus or the sex organs or anus of another person, or intentionally causes such exposure by another or engages in any overt act of sexual gratification, and does so under circumstances in which the person knows that the conduct is likely to cause affront or alarm: Provided, That it is not considered indecent exposure for a mother to breast feed a child in any location, public or private.
(b) Except as provided in subsection (c), any person who violates the provisions of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail not more than ninety days, or fined not more than two hundred fifty dollars, or both fined and confined.
(c) Any person who violates the provisions of subsection (a) of this section by intentionally exposing himself or herself to another person and the exposure was done for the purpose of sexual gratification, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars or confined in jail not more than twelve months, or both. For a second offense, the person is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one

thousand dollars and confined in jail for not less than thirty days nor more than twelve months. For a third or subsequent offense, the person is guilty of a felony and, upon conviction thereof, shall be fined not more than three thousand dollars and imprisoned in a state correctional facility for not less than one year nor more than five years.

WISCONSIN

Chapter 944, Subchapter IV: Obscenity

944.20. Lewd and lascivious behavior
(1) Whoever does any of the following is guilty of a Class A misdemeanor:
(a) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or
(b) Publicly and indecently exposes genitals or pubic area.
(2) Subsection (1) does not apply to a mothers breast-feeding of her child

Chapter 947: Crimes Against Public Peace, Order, and Other Interests

947.01. Disorderly conduct
Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

WYOMING

Title 6. Chapter 4, Article 2: Public Indecency

§ 6-4-201. Public indecency; exception; penalties
(a) A person is guilty of public indecency if, while in a public place where he may reasonably be expected to be viewed by others, he:
(i) Performs an act of sexual intrusion, as defined by W.S. 6-2-301(a)(vii); or
(ii) Exposes his intimate parts, as defined by W.S. 6-2-301(a)(ii), with the intent of arousing the sexual desire of himself or another person; or
(iii) Engages in sexual contact, as defined by W.S. 6-2-301(a)(vi), with or without consent, with the intent of arousing the sexual desire of himself or another person.
(b) The act of breastfeeding an infant child, including breastfeeding in any place where the woman may legally be, does not constitute public indecency.
(c) Public indecency is a misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than seven hundred fifty dollars ($750.00), or both.

AMICUS CURIAE BRIEF

No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

—v.—

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, THE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL-CIO, DIRECTORS GUILD OF AMERICA, MINNESOTA PUBLIC RADIO/AMERICAN PUBLIC MEDIA, THE NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE, THE NATIONAL COALITION AGAINST CENSORSHIP, THE NATIONAL FEDERATION OF COMMUNITY BROADCASTERS, PEN AMERICAN CENTER, SCREEN ACTORS GUILD, SOUTHERN CALIFORNIA PUBLIC RADIO, THE TULLY CENTER FOR FREE SPEECH, WASHINGTON AREA LAWYERS FOR THE ARTS, THE WOODHULL FREEDOM FOUNDATION, AND WRITERS GUILD OF AMERICA, WEST, IN SUPPORT OF RESPONDENTS

STEVEN R. SHAPIRO
Counsel of Record
CHRISTOPHER A. HANSEN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500
sshapiro@aclu.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE FCC'S REGULATION OF INDECENT SPEECH UNDER 18 U.S.C. § 1464 HAS BEEN INCONSISTENT AND UNPREDICTABLE 5

A. FCC Enforcement Of The Indecency Ban Since *Pacifica* Has Been Inconsistent, Unpredictable, and Highly Subjective 5

B. FCC Enforcement, Both Before And After Its New Fleeting Expletives Rule, Has Chilled Valuable Expression 11

II. SECTION 1464 SHOULD BE DECLARED UNCONSTITUTIONAL INSOFAR AS IT AUTHORIZES THE FCC TO PROHIBIT INDECENT SPEECH 16

A. Case Law Since *Pacifica* Has Recognized The Vagueness And Overbreadth Of The FCC's Indecency Test 16

B. Broadcasting Is No Longer "Uniquely Pervasive" And "Uniquely Accessible To Children" – The Characteristics That In *Pacifica* Were Said To Justify FCC Censorship Of Constitutionally Protected Expression 19

C. The FCC's Unbridled Discretion In Deciding Whether A Program Is "Patently Offensive," And Its Second-Guessing Of The Artistic Judgments Of Filmmakers And Programmers, Are Classic Hallmarks Of An Unconstitutional Censorship System ... 22

D. The Post 10-p.m. Safe Harbor Does Not Save the FCC's Censorship Regime 30

CONCLUSION 33

ADDENDUM 1a

STATEMENTS OF INTEREST 1a

TABLE OF AUTHORITIES

CASES

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are a diverse group of media, arts and advocacy organizations concerned about free expression in broadcasting. Many of the organizations have felt the real-world chilling effect of indecency censorship. Their individual statements of interest are set out in an addendum to this brief.

STATEMENT OF THE CASE

Federal law prohibits "obscene, indecent or profane" speech on broadcast radio and television. 18 U.S.C. § 1464. This case was brought to challenge a new rule promulgated by the FCC in 2004, presumptively banning even one "fleeting expletive" as indecent, and the agency's application of that rule to two broadcasts. On review, the court of appeals held that the fleeting expletives rule was arbitrary and capricious, in violation of the Administrative Procedures Act. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2nd Cir. 2007) ("*Fox I*"). The court found that the FCC had not given a reasonable explanation for its dramatic change in policy – from its many statements over the years that a mere fleeting expletive would not be sufficient for an indecency finding, to a wholesale reversal in 2004,

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[1] The parties have filed blanket consents to the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

announcing that a single vulgarity is presumptively both indecent and profane.

In reversing the court of appeals decision, this Court found that the FCC's new policy was neither arbitrary nor capricious. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) ("*FCC*"). Specifically, the Court found that the FCC had acknowledged its change of course and had provided rational reasons for expanding its enforcement activities. The Court then declined to address the constitutional questions presented by the FCC's new rule; instead, it remanded the case, "see[ing] no reason to abandon our usual procedures in a rush to judgment without a lower court opinion." *Id.* at 1819.

On remand, the court of appeals held that the FCC's fleeting expletives policy was unconstitutionally vague and created a chilling effect that goes far beyond the fleeting expletives at issue in this case. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 319 (2nd Cir. 2010) ("*Fox II*"). It first noted that the speech covered by the FCC's indecency policy "is fully protected by the First Amendment." *Id.* at 325. The court expressed concern over the rationale for providing less protection for speech on broadcast television than on other media - including cable television and the Internet - as "[t]he past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus." *Id.* at 326. Nonetheless, the court concluded that "regardless of where the outer limit of the FCC's authority lies, the FCC's indecency policy is unconstitutional because it is impermissibly vague." *Id.* at 327. Pointing to the many inconsistencies and subjective elements of

Commission decision making, including the so called "exceptions" to the indecency policy, the court held that the indecency test fails to provide "broadcasters the notice that is required by the First Amendment." *Id.* at 333. The court concluded by finding that there was "ample evidence in the record that the FCC's indecency policy has chilled protected speech" and "promot[ed] wide self-censorship of valuable material which should be completely protected under the First Amendment." *Id.* at 334-35.

This Court granted certiorari to determine "[w]hether the [FCC's] current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution."

SUMMARY OF ARGUMENT

As a general proposition, the First Amendment protects indecent but non-obscene speech. This Court's decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), allowing the government to bar indecent speech from the broadcast airwaves, has always been a constitutional outlier. The time has come to declare the indecency provisions of 18 U.S.C. § 1464 unconstitutional. At the very least, the FCC's "fleeting expletive" rule must be struck down as a violation of the First Amendment.[2]

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[2] As the unconstitutionality of the "fleeting expletive" rule is fully discussed in Respondents' Briefs, *amici* do not address it here. *See, e.g.*, Brief of Respondent Fox Television Stations, Inc. et al. at 26-39; Brief of Respondent ABC Television Affiliates Ass'n et al. at 17-27; Brief of Respondent CBS Television Network Affiliates Ass'n et al. at 28-39. Likewise, *amici* endorse

Thirty years after *Pacifica*, it is abundantly clear that the authority to regulate indecent speech has produced a patchwork quilt of inconsistent and arbitrary decision making by the FCC that is utterly lacking in the precision that this Court has required in delineating the line between permissible and impermissible speech.

Even taken on its own terms, *Pacifica* does not confer the broad authority that the FCC has since claimed. More fundamentally, the factual and doctrinal premises that this Court relied on in *Pacifica* have been eroded over the past three decades. In 1978, cable television was still a rarity in most homes. This Court could not have anticipated, and did not anticipate, the Internet revolution and the development of communications platforms like Facebook and Twitter, that make it impossible any longer to characterize broadcast radio and television as "uniquely pervasive" and "uniquely accessible to children."

In *Reno v. ACLU*, 521 U.S. 844 (1997), this Court condemned an indecency test identical to the

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but do not separately address the arguments concerning the unconstitutionality of the application of the FCC's policies to nudity fully discussed in Respondents' Briefs. *See, e.g.*, Brief of Respondent ABC, Inc. et al. at 12-23; Brief of Respondent Fox Television Stations, Inc. et al. at 26-39; Brief of Respondent ABC Television Affiliates Ass'n et al. at 18-23, 34-42; Brief of Respondent CBS Television Network Affiliates Ass'n et al. at 28-39; *See also CBS Corp. v. FCC*, No. 06-3575, 2011 WL 5176139 (3rd Cir. Nov. 2, 2011) (holding, even in light of *FCC v. Fox*, 129 S. Ct. 1800 (2009), that the FCC acted arbitrarily when it failed to provide a reasoned explanation for its change in policy on fleeting images of nudity).

FCC's as both vague and overbroad. Although stopping just short of a holding on vagueness, the Court vividly outlined the evils of essentially standardless indecency enforcement. The FCC's attempts at clarification of its indecency policy have not cured the deficits pointed out in *Reno*, and have only led to more confusion and contradictory decisions.

New technologies have also created less burdensome alternatives to government censorship for parents who wish to shield their children from vulgar language or images on the airwaves. Hence, whether or not First Amendment strict scrutiny applies to the FCC's indecency regime, it is, today, an overly restrictive remedy for speech that some viewers and listeners find offensive.

ARGUMENT

I. THE FCC'S REGULATION OF INDECENT SPEECH UNDER 18 U.S.C. § 1464 HAS BEEN INCONSISTENT AND UNPREDICTABLE

A. FCC Enforcement Of The Indecency Ban Since *Pacifica* Has Been Inconsistent, Unpredictable, and Highly Subjective

In 1978, a bare majority of this Court approved the FCC's censorship of "indecent" speech on the airwaves, in the context of the "verbal shock treatment" of one satiric monologue. *Pacifica*, 438 U.S. at 756-57 (Powell, J., concurring). The Court justified its lenient standard of First Amendment scrutiny by noting the history of broadcast regulation (based on spectrum scarcity) and its description of

broadcasting as "uniquely pervasive" and "uniquely accessible to children." *Id.* at 748-49.

At the same time, the *Pacifica* Court emphasized the "narrowness" of its holding. *Id.* at 750-51; *see also Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126-27 (1989); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74 (1983). As Justice Breyer explained when this case was previously before the Court, "two Members of the [*Pacifica*] majority suggested that they could reach a different result, finding an FCC prohibition unconstitutional, were that prohibition aimed at the fleeting or single use of an expletive." *FCC*, 129 S.Ct. at 1833 (Breyer, J., dissenting).

Rather than test that proposition, the FCC followed a relatively restrained enforcement policy for the nine years following *Pacifica*. Then, in 1987, it expanded its indecency regime to embrace any sexual innuendo or other content that the commissioners considered offensive, regardless of whether there was "verbal shock treatment." Two of the three programs condemned under this new "generic" indecency standard had aired on noncommercial radio stations; one concerned homosexuality and AIDS. *New Indecency Enforcement Standards*, 2 FCC Rcd 2726 (1987); *Pacifica Found., Inc.*, 2 FCC Rcd 2698 (1987); *Regents of the Univ. of Cal.*, 2 FCC Rcd 2703, *on reconsideration*, 3 FCC Rcd 930 (1987).[3]

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[3] The new generic standard was a response to pressure from Morality in Media and other groups to reverse the Reagan Administration's "laissez faire" approach to indecency. *See* John Crigler & William Byrnes, *Decency Redux: The Curious*

The agency's indecency enforcement between 1987 and 2003 was sporadic and unpredictable. In 2001, it ruled that the African-American poet and theater artist Sarah Jones's "Your Revolution," broadcast on a noncommercial community station, was indecent. "Your Revolution" is a poetic protest against misogyny in hip-hop music. After Jones sued, and just before the FCC's brief was due in the court of appeals, the agency reversed itself and decided that the poem was not indecent after all, mooting Jones's challenge to the indecency standard. *KBOO Found.*, 18 FCC Rcd 2472 (2003).

Up to this point, the FCC did not consider "fleeting expletives" indecent. Indeed, when the musician Bono exclaimed "this is really fucking brilliant" at the 2003 televised Golden Globe Awards ceremony, the FCC initially ruled that it was not indecent because it did not refer to sexual or excretory functions. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd 19859 (2003). However, a month after Janet Jackson's "wardrobe malfunction" at the 2004 Super Bowl half-time show, and quite plainly in response to the ensuing political uproar, the agency reversed gears. It announced that all uses of the word "fuck," even fleeting exclamations, necessarily refer to sex and therefore are presumptively indecent. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975, 4978-79 (2004) ("*Golden Globe Awards*"). The

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History of the New FCC Broadcast Indecency Policy, 38 CATH. U. L. REV. 329 (1989).

commissioners asserted that even though Bono used "fucking" as "an intensifier," not a sexual reference, any use of the word, or a variation, "invariably invokes a coarse sexual image." *Id.* at 4979. Previous agency rulings to the contrary were "no longer good law." *Id.* at 4980.

In an even more dramatic departure from prior practice, the FCC also ruled that Bono's exclamation was profane. Until *Golden Globe*, the agency had understood "profanity" to have a religious dimension. *See Fox I*, 489 F.3d at 466-67. In *Golden Globe*, however, it rejected all of its previous statements on the subject, and created a vague new profanity definition that essentially overlapped with the new fleeting expletives rule – "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Golden Globe Awards*, 19 FCC Rcd at 4981.

It was not long after the FCC created these new rules that it announced an exception for the film "Saving Private Ryan," broadcast by many ABC stations on Veterans Day in 2004. Complaints had cited dialogue including "'fuck,' and variations thereof; 'shit,' 'bullshit,' and variations thereof, 'bastard,' and 'hell,'" as well as "Jesus" and "God damn." *Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, 4509 (2005). The Commission found that the material, "in context, is not patently offensive, and therefore, not indecent," or profane. *Id.* at 4510. The FCC explained that the rough language was "integral to the film's objective of conveying the horrors of war

through the eyes of these soldiers," and that deleting or bleeping "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." *Id.* at 4512-13.

This sensitivity to "the nature of the artistic work" did not extend, a year later, to the FCC's March 2006 order, which condemned a PBS documentary "The Blues," directed by Martin Scorsese, because of expletives. *Complaints Regarding Various Television Broad. Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*"). The commissioners refused to apply the "Saving Private Ryan" exception to "The Blues" because, they said, "we do not believe" that the station that aired the show "has demonstrated that it was essential to the nature of an artistic or educational work ... or that the substitution of other language would have materially altered the nature of the work." *Id.* at 2685-86.[4]

The *Omnibus Order* addressed dozens of other programs containing coarse language or sexual situations. Its evaluation of "NYPD Blue," however, provided a striking example of unbridled subjectivity. The commissioners declared that "bullshit" (uttered by the one character) was profane and indecent, but "dick" and "dickhead" were not. *Id.* at 2696-98. Likewise, non-explicit suggestions of teenage sexual activity were deemed indecent in the CBS program

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[4] Commissioner Adelstein dissented because the "coarse language is a part of the culture of the individuals being portrayed," and "if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary." 21 FCC Rcd at 2728.

"Without a Trace," while explicit discussions of teenage sex on "Oprah" were not.[5] *Id.* at 2705-07.

The FCC's most recent intellectual acrobatics came after this case was remanded for reconsideration of the four indecency and profanity rulings that were before the court of appeals. The agency dismissed the case against "NYPD Blue" on a technical ground (the complainant did not reside in the time zone where the broadcast occurred). And it reversed itself on an utterance of "bullshitter" in "The Early Show" because, it now said, the show was a news interview, a context in which government should defer to producers' editorial judgment. Since the commissioners warned that "there is no outright news exemption from our indecency rules," this deference promised to be just as vague and unpredictable as the rest of the FCC's censorship regime. *Fox I*, 489 F.3d at 458 (quoting *Complaints Regarding Various Television Broad. Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13229 ,13327 (2006) ("*Remand Order*")).

The unavoidable conclusion from even this brief review of indecency enforcement since *Pacifica* – and in particular since announcement of the fleeting expletives rule – is that the FCC's conduct has been woefully inconsistent and characterized by unpredictable detours and unprincipled reversals.

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[5] "Without a Trace" was the subject of a separate FCC ruling issued on the same date as the *Omnibus Order*. *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broad. of the Program "Without a Trace,"* 21 FCC Rcd 2732 (2006).

B. FCC Enforcement, Both Before And After Its New Fleeting Expletives Rule, Has Chilled Valuable Expression

This Court has repeatedly warned that the overbreadth doctrine "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 237 (2002). This is precisely what has happened as a result of the FCC's vague and shifting indecency regime.

In response to the fleeting expletives rule, PBS bleeped soldiers' language, and with it the reality of war reporting, from the documentaries "A Soldier's Heart" and "Return of the Taliban," and from a Frontline episode, "The New Asylums."[6] Language in PBS's "The Enemy Within" was purged even though it documented the specific words used by an informant to threaten a suspect.[7] PBS also decided to delay airing a World War II documentary by Ken Burns until after 10 p.m. due to concerns over two

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[6] Kara Canty, *FCC's Punishing Fines Have Chilling Effect on Broadcasters*, BALT. SUN, Oct. 13, 2006, *available at* http://www.kintera.org/site/apps/nlnet/content2.aspx?c=hrLQKWPGLuF&b=1368219&ct=3039413; Rebecca Dana, *@$#&*% Ken Burns! PBS Scrubbing G.I. Mouths With Soap*, N.Y. OBSERVER, Oct. 2, 2006, *available at* www.observer.com/node/52747; Louis Wiley, Jr., *Censorship at Work*, CURRENT.ORG, July 17, 2006, *available at* www.current.org/fcc/fcc0613indecency.shtml.

[7] Dana, *supra* n.6.

possibly indecent words.[8] The producers of "Masterpiece Theater" chose not to make available to PBS member stations the original version of the critically-acclaimed British series "Prime Suspect" because of concern over language, instead offering the public television stations a lightly or heavily edited version.[9] PBS similarly wondered whether to pixilate actress Helen Mirren's mouth as she uttered an inaudible "fuck" in another "Masterpiece Theater" production.[10]

In 2002, a documentary produced by American Public Media ("APM"), which chronicled "the sounds and voices of the World Trade Center and its surrounding neighborhood," was broadcast uncut on dozens of public radio stations. The program included a poem incorporating the word "bullshit." When the show was rebroadcast in September 2006, APM "felt that it had no choice but to alert its affiliates and to 'bleep' this word" from the poem. Comments of Minnesota Public Radio/American Public Media, FCC Remand Proceedings, DA 06-1739 (Sept. 21, 2006), Affidavit of Thomas Kigin, ¶10 (A-214-216).

CBS affiliates were extremely hesitant to air yet another World Trade Center documentary, "9/11,"

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[8] Elizabeth Jenson, *Soldier's Words May Test PBS Language Rules*, N.Y. TIMES, July 22, 2006, *available at* http://www.nytimes.com/2006/07/22/arts/television/22pbs.html.

[9] Jacques Steinberg, *Eye on F.C.C., TV and Radio Watch Words*, N.Y. TIMES, May 10, 2004, *available at* http://www.nytimes.com/2004/05/10/us/eye-on-fcc-tv-and-radio-watch-words.html?pagewanted=all&src=pm.

[10] Dana, *supra* n.6.

featuring real audio footage of firefighters on September 11th.[11] Although it contains occasional expletives, the award winning documentary had aired twice without complaint. Still, in 2006, at least two dozen CBS affiliates chose not to air the documentary or delay airing it until after 10 p.m.

Niagara Frontier Radio administers a radio reading service for the blind; by 2006, it had aired more than 150,000 hours of book readings to thousands of visually impaired listeners. It broadcast through a leased subcarrier of a local FM signal as well as a local ABC affiliate with a wider range. In 2005, the ABC station removed the program, citing a single complaint about the Tom Wolfe novel *I Am Charlotte Simmons*. When the program was reinstated two weeks later, the station would air it only after 10 p.m., thereby reducing both the hours that visually impaired listeners can enjoy the show and the size of the listening audience. Comments of Minnesota Public Radio/American Public Media, FCC Remand Proceedings, DA 06-1739 (Sept. 21, 2006), Affidavit of Robert Sikorski (A-265-271).

The widely syndicated program "Broadway's Biggest Hits," with more than 150,000 listeners, faced many dilemmas in the wake of the new indecency and profanity rules. In 2004, stations

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[11] *Worries Over Profanity in CBS' 9/11 Show*, Assoc. Press, Sept. 3, 2006, available at http://today.msnbc.msn.com/id/14657719/ns/today-entertainment/t/worries-over-profanity-cbs-show/.

fearful of FCC punishment were given a sanitized version of a song in the hit musical "A Chorus Line," which "humorously tells of how plastic surgery and improving one's 'tits and ass' can improve one's chances for a job." In the next two years, these concerns resulted in full review of the playlist and deletion of "well-known, popular and culturally and musically significant songs" from such shows as "Les Miserables," "The Producers," "Avenue Q," and "Miss Saigon." *Id.*, Affidavit of Stanley Wilkinson (A-239-247).

PBS was wary of airing "Eyes on the Prize," another award winning documentary, because of language.[12] The documentary, about the Civil Rights Movement, contains a scene where one of the members of the Student Non-Violent Coordinating Committee states, "If we can't sit at the table, let's knock the fucking legs off." He quickly adds, "Excuse me." PBS aired the documentary but offered edited versions to its member stations.

It will not avail the FCC to argue that in some or all of these instances, it might find that the vulgar words, "in context," were not indecent. Programmers – especially at noncommercial stations with limited budgets – cannot afford to risk an indecency fine,[13] or even to pay the legal costs incurred in responding to FCC investigations. Because the permissible

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[12] Gail Shister, *Shadow of Censorship Over 'Prize'*, PHILA. INQUIRER, Sept. 20, 2006, at C01.

[13] In 2006, Congress increased the fines for broadcast indecency tenfold, to $325,000 for each violation. Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006).

parameters are unclear and continue to shift, self-censorship of fiction, drama, history, and journalism occurs with increasing frequency. As the court of appeals noted below, "[t]here is little rhyme or reason to these decisions and broadcasters are left to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview.'" *Fox II*, 613 F.3d at 332.

PBS President Paula Kerger explained: "When you have stations whose operating budgets are only a couple of million dollars, even the old fines, once you factor in all the legal work, were daunting. The fines now would put stations out of business."[14] Undoubtedly, there will be "countless other situations where broadcasters will exercise their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC's fines. This chill reaches speech at the heart of the First Amendment." *Id.* at 335. The FCC's presumptive ban on fleeting expletives, with exceptions to be invoked at the agency's discretion, has created a severe chill, especially in noncommercial broadcasting.

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[14] Quoted in Mark Dawidziak, *PBS: Language in Burns' 'War' Worth Fighting For*, SUN JOURNAL, July 31, 2006, *available at* http://www.sunjournal.com/node/175642. *See also* Kigin Affidavit, ¶5 (A-209) ("MPR simply cannot risk either huge fines or license revocation ... if it were to guess wrong about what is now acceptable for broadcast.").

II. SECTION 1464 SHOULD BE DECLARED UNCONSTITUTIONAL INSOFAR AS IT AUTHORIZES THE FCC TO PROHIBIT INDECENT SPEECH

Justice Breyer has noted that sometimes it is wise to watch how a medium develops before imposing strict legal rules. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 740–42 (1996). We now have more than thirty years' experience with FCC censorship of broadcasting, long enough to conclude that its indecency regime cannot be reconciled with the First Amendment.[15]

A. Case Law Since *Pacifica* Has Recognized The Vagueness And Overbreadth Of The FCC's Indecency Test

Congress chose the FCC's indecency standard to regulate the Internet when it passed the 1996 Communications Decency Act (the "CDA"). Invalidating the CDA in *Reno v. ACLU*, this Court condemned the indecency test as both vague and overbroad. 521 U.S. 844 (1997).

This Court found the test "problematic" because such terms as "patently offensive" and "community standards" are left undefined. [16] The

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[15] Alternatively, this Court could preserve the constitutionality of § 1464 by construing it to ban only constitutionally unprotected obscenity from the airwaves. *See Manual Enter., Inc. v. Day*, 370 U.S. 478, 482-84 (1962) (construing statute banning "obscene, lewd, lascivious, indecent, filthy or vile" articles to cover only obscenity).

[16] The court of appeals, distinguishing the FCC's definition from the CDA, noted that the FCC has further elaborated on its

lack of definition creates "special First Amendment concerns because of its obvious chilling effect on free speech." *Id.* at 870-72. This Court explained the difference between "patently offensive" in the CDA, where it was troublesomely vague, and in obscenity law, where it is only one part of the definition of unprotected speech. The other, more specific requirements of the obscenity definition – that the expression appeal to "the prurient interest," lack serious value, and be "specifically defined by the applicable state law" – cabin the inherent vagueness of "patent offensiveness." *Id.* at 872-74. Without these additional safeguards, the CDA's ban on "patently offensive" speech "unquestionably silences some speakers whose messages would be entitled to constitutional protection." *Id.* at 874. Although the Court's discussion of vagueness fell just short of a square holding, this Court has recently cited *Reno* for the proposition that the indecency standard is unconstitutionally vague because it requires "wholly subjective judgments without statutory definitions,

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definition of indecency in *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001), and in its fleeting expletives rule. However, as the foregoing examples demonstrate, the FCC, under these "guidelines" has been woefully inconsistent and routinely contradicted itself. Likewise, the FCC's declaration of "fuck" and "shit" as presumptively indecent equally does not solve the vagueness issues raised in *Reno* as exceptions are continually invoked at the agency's discretion. The court of appeals conceded that although the FCC has provided slightly more explanation of its definition of indecency than the definition in the CDA, "[t]his additional guidance [was not] sufficient to survive a vagueness challenge." *Fox II*, 613 F.3d at 329.

narrowing context, or settled legal meanings." *United States v. Williams*, 553 U.S. 285, 306 (2008) (citing *Reno*, 521 U.S. at 870-71 & n.35); *See also Ashcroft v. ACLU*, 535 U.S. 564, 578 (2002) (describing the indecency standard's "unprecedented breadth and vagueness").

Reno struck down the indecency standard on grounds of overbreadth. This Court reiterated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," 521 U.S. at 874 (quoting *Sable Commc'n*, 492 U.S. at 126), and noted that indecency "cover[s] large amounts of nonpornographic material with serious educational or other value." *Id.* at 877-78. "Where obscenity is not involved, . . . the fact that protected speech may be offensive to some does not justify its suppression." *Id.* at 874-75 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977)). Following the time-honored rule that government cannot reduce the adult population to reading or viewing "only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957), this Court noted that there are less constitutionally burdensome ways to shield youngsters from material that may not be appropriate for them. 521 U.S. at 874-79.

Although *Reno* distinguished *Pacifica*, this Court's condemnation of the indecency standard on grounds of both vagueness and overbreadth cannot be reconciled with the FCC's broad-ranging, inconsistent, and whimsically discretionary application of that standard to broadcasters over the

past thirty years.[17] The Commission's use of the same indecency test that this Court condemned in *Reno, Ashcroft,* and *Williams* cannot be squared with a constitutional reading of section 1464.

B. Broadcasting Is No Longer "Uniquely Pervasive" And "Uniquely Accessible To Children" – The Characteristics That In *Pacifica* Were Said To Justify FCC Censorship Of Constitutionally Protected Expression

At the time *Pacifica* was decided, broadcasting was the only electronic mass medium. It has since become one among many, and indistinguishable to most viewers from cable television. "Indeed, we face a media landscape that would have been almost unrecognizable in 1978." *Fox II,* 613 F.3d at 326. Thus, the "uniquely pervasive" presence of broadcasting that this Court identified in *Pacifica* as the principal rationale for subjecting the medium to FCC censorship of non-obscene speech no longer exists. As the court of appeals recognized, "it is

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[17] As discussed in Respondents' Briefs, *Holder v. Humanitarian Law Project,* 130 S.Ct. 2705 (2010), ("*HLP*") does not draw the court of appeals' vagueness rulings into question. *HLP* established that an as-applied vagueness challenge must be evaluated on the basis of plaintiff's own speech rather than hypothetical speech of others. Here, the court of appeals analyzed the FCC's application of the new indecency policy to *actual* broadcasts not the imagined speech of others. *See e.g.,* Brief of Respondent Fox Television Stations, Inc. et al. at 51-53; Brief of Respondent ABC Television Affiliates Ass'n et al. at 48-50; Brief of Respondent CBS Television Network Affiliates Ass'n et al. at 26-27.

increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." *Fox I*, 489 F.3d at 465. Justice Thomas noted, concurring with the previous decision in this case, that "the justifications relied on by the Court in ... *Pacifica*—'spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast'...technological advances have eviscerated the factual assumptions" underlying *Pacifica*. *FCC*, 129 S.Ct. at 1821 (Thomas, J., concurring) (internal citations omitted).

To be sure, broadcasting remains pervasive, but no longer uniquely so, given that about 90% of the nation's households receive *all* their TV programming through one, nonbroadcast, distributor (typically either cable or satellite).[18] Still more people are watching TV shows online through Internet TV services like Hulu or network websites, circumventing broadcast television altogether.[19]

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[18] *Satellite TV Penetration Up Significantly*, CONSUMERAFFAIRS.COM, Aug. 18, 2005, *available at* www.consumeraffairs.com/news04/2005/jdpower_satellite.html; *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506-07 (2006) (94.2 million out of a total of 109.6 million TV households receive all their video programming through an "MVPD" [multichannel video programming distributor] – either cable, satellite, or other nonbroadcast technology).

[19] Zach Pontz, *More turning to Web to watch TV, movies*, CNNTECH, Feb. 6, 2009, *available at* http://articles.cnn.com/2009-02-06/tech/internet.tv_1_hulu-internet-tv-joost?_s=PM:TECH; Saul Hansell, *More People Turn to the Web to Watch TV*, N.Y. TIMES, Aug. 1, 2005, *available at*

Indeed in response to this growing trend, at least one network that censored a show for regular broadcast because of fear of FCC fines, released the original uncut version online.[20] In the 30 years since *Pacifica*, there has been "an explosion of media sources" and rather than being a uniquely pervasive medium, "broadcast television has become only one voice in the chorus." *Fox II*, 613 F.3d at 326. This convergence of technology eliminates the justification for a government censorship system that is constitutionally off-limits for every other medium. *E.g.*, *Reno*, 521 U.S. 844 (the Internet); *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. 727 (public and leased access cable).

Underlying *Pacifica* was a history of lesser First Amendment protection for broadcasting. Government regulation was deemed justified in light of the limited capacity of the broadcast spectrum, and consequent scarcity of licenses. Whatever one thinks of the scarcity rationale in the modern media world, there is a categorical difference between structural rules designed to promote more speech, *see Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943) (approving FCC rules that curbed national networks' market power by prohibiting them from dictating the programming of affiliated stations), and censorship rules based on broad, shifting, and culturally driven criteria such as "patent offensiveness."

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http://www.nytimes.com/2005/08/01/technology/01video.html?pagewanted=all.

[20] Bill Carter, *WB Censors Its Own Drama for Fear of FCC Fines*, N.Y. TIMES, Mar. 23, 2006, *available at* http://www.nytimes.com/2006/03/23/arts/23bedf.html.

Moreover, as the court of appeals noted, technological developments since *Pacifica* make government control unnecessary in those instances in which parents wish to shield their children from programming they consider inappropriate. *Fox I*, 489 F.3d at 466; *See also Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741-42 (2011) (noting that the real goal of the statute at issue was to support "what the state thinks parents *ought* to want" and observing that parental views vary widely). The FCC itself has recognized that v-chips and lockboxes are readily available blocking technologies. *Saving Private Ryan*, 20 FCC Rcd at 4508, nn.8-9. Every television 13 inches or larger sold in the United States after January 2000 contains a v-chip. *Fox II*, 613 F.3d at 326; 47 U.S.C. § 303(x). Further, when the country made the transition to digital television in 2009 anyone with a digital converter box also has access to a v-chip. *Id.* Indeed, this Court has held that lockboxes and other technologies were constitutionally less burdensome means of addressing parental concerns in striking down a time-channeling requirement for indecency on cable. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 809-15 (2000).

C. The FCC's Unbridled Discretion In Deciding Whether A Program Is "Patently Offensive," And Its Second-Guessing Of The Artistic Judgments Of Filmmakers And Programmers, Are Classic Hallmarks Of An Unconstitutional Censorship System

The FCC's record of enforcement demonstrates the evils of a vague, overly discretionary censorship

regime. As the court of appeals previously noted, the agency's subjective judgments embody the same arbitrariness and unpredictability that led to invalidation of licensing schemes in *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992) and *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). *See Fox I*, 489 F.3d at 464. Indeed, the indecency regime outdoes the licensing processes in those cases in the sheer breadth of the agency's claim of discretion to decide what, in the personal judgment of the commissioners, is patently offensive and what has sufficient artistic necessity, news value, or other merit to escape punishment.

With its contrasting decisions on "Saving Private Ryan," "The Blues," "The Early Show," and many other programs that were at issue in the *Omnibus Order*, the FCC has appointed itself the arbiter of both news value and artistic necessity. Under our constitutional system, it is not the role of government officials to second-guess artistic or editorial judgments. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (broadcasters' decisions "should be left to the exercise of journalistic discretion"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-258 (1974) (protecting newspaper's exercise of editorial judgment).[21] It is

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[21] The sole exception is obscenity law, where "serious value" is part of the three-part test for determining whether a work is constitutionally protected in the first place. *Miller v. California*, 413 U.S. 15, 24 (1973). Once expression *is* constitutionally protected, government officials cannot ban or burden content they dislike based on their assessments of artistic value or necessity. *Winters v. New York*, 333 U.S. 507, 510 (1948). Of course, government makes judgments about

the writer, artist or filmmaker who decides what is artistically necessary in a creative work. Considering the diverse attempts to define art – from Tolstoy's essay *What is Art?* to the Dada movement's "Anything is art if an artist says it is"[22] – the inherent subjectivity of the task alone makes it inappropriate for a government agency.

The FCC's disparate treatment of "The Blues" – an educational documentary film incorporating live footage of historically significant individuals who have influenced America's musical culture – and "Saving Private Ryan" – a brutally violent entertainment film concerning the experiences of fictional characters – is a striking illustration of the unbridled discretion that the agency claims. Although the Commission found variants on "fuck" and "shit" to be indecent in "The Blues," it absolved the far more frequent use of those words in "Saving Private Ryan" because it thought editing them "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." It is unclear how the Commission arrived at these contrary conclusions. One possible explanation is that the cultural milieu of the mainstream movie "Saving Private Ryan" was more familiar to the commissioners than the largely African-American background of "The Blues." A similar dynamic can be seen in the Commission's

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artistic value in awarding prizes, *e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) – a context not relevant here.

[22] Leo Tolstoy, WHAT IS ART? (1897); MUSEUM OF MODERN ART, THREE GENERATIONS OF TWENTIETH-CENTURY ART (1972) 48 (quoting Marcel Duchamp).

earlier finding of indecency against Sarah Jones's "Your Revolution" – a poem that presumably speaks most directly to the experience of African-American women. Even without intending any racial or ethnic bias, decision makers in a subjective and discretionary censorship system may be more likely to find "patently offensive" those cultural expressions with which they are less familiar.

From its censorship in 1987 of a program dealing with homosexuality and AIDS to its tone-deafness to the educational and artistic value of authentic colloquial language in "The Blues," the Commission's thirty years of indecency enforcement have borne out Justice Brennan's warning that allowing a government agency to ban what it considers "patently offensive" invites "an acute ethnocentric myopia" that has no place in our "land of cultural pluralism," where "there are many who think, act, and talk differently" from the commissioners of the FCC. *Pacifica*, 438 U.S. at 775 (Brennan, J., dissenting).

The FCC's efforts to distinguish among various words in its *Omnibus* and *Remand Orders* provide further examples of unbridled discretion. Whether "dickhead" or "pissed off" are more or less offensive than "bullshit" is simply a matter of taste, and the commissioners' efforts to rationalize their taste merely emphasize the arbitrary nature of the enterprise. The *Remand Order's* reversal on the use of "bullshitter" in "The Early Show," similarly, confuses rather than clarifies the agency's shifting standards. By changing its mind about its original indecency and profanity ruling but simultaneously warning that "there is no outright news exemption

from our indecency rules," the FCC leaves news broadcasters in as much limbo as documentary and feature producers as to when the FCC might find an exception to the fleeting expletives rule.

The FCC further assumes the linguistic expertise to decide that fleeting expletives – in particular, "fuck," "shit," and their many compounds and variations – always refer to sexual or excretory activities or organs even when they are merely used for color or intensity. But as "The Blues" and many other documentary films demonstrate, these words have many nonsexual and non-excretory meanings.

The court of appeals previously noted that "even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced 'sexual or excretory organs or activities.'" *Fox I*, 489 F.3d at 459-460 (citing President Bush's remark to British Prime Minister Blair that the UN should "get Syria to get Hezbollah to stop doing this shit," and Vice President Cheney's widely-reported "Fuck yourself" to Senator Patrick Leahy on the Senate floor). Justice Stevens noted that "[t]here is a critical distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion. One rests at the core of indecency; the other stands miles apart." *FCC*, 129 S.Ct. at 1827 (Stevens, J., dissenting). The FCC's effort to elide this distinction by arguing that there is always a sexual or excretory "connotation" stretches its own definition of indecency (reference to sexual or excretory activities or organs) to the breaking point.

Scholarship supports the conclusion that expletives not only have a multitude of nonsexual or excretory meanings; they often have serious value. As Professor Timothy Jay explains, expletives are used for emphasis and emotive charge; they serve psychological and social purposes and communicate powerful messages wholly apart from their more literal meanings. Timothy Jay, WHY WE CURSE (2000). As Justice Ginsburg noted in dissenting to the Court's previous decision in this case, this Court has held that "'words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.'" *FCC*, 129 S.Ct. at 1829 (Ginsburg, J., dissenting) (quoting *Cohen v. California*, 403 U. S. 15 (1971)).

In 2004, Professor Jay submitted expert testimony in an FCC case involving a radio documentary, "Movin' Out the Bricks," which explored the lives of Chicago public housing residents, including one woman who described drug use as getting "fucked up and shit like that." Jay explained that in many contexts, "fuck" and "shit" are part of ordinary conversation and have no sexual or excretory connotation. In this case, they were essential to the documentary's authenticity. To clean up the woman's language would "undermine the listeners' understanding of the impact of public housing ... If we substitute *inebriated* for *fucked up*, we erase the emotional impact." Timothy Jay,

Statement of Expert Opinion, *WBEZ-FM*, No. EB-04-IH-0323, (Sept. 21, 2004).

The First Amendment protects these expletives in literature, art, and political speech in part because of their emotive power. *See also Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 805 (opinion of Kennedy, J.) ("[i]n artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions.'") (quoting *Cohen*, 403 U.S. at 26, in part); *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito and Kennedy, JJ., concurring) (the First Amendment protects any speech "that can plausibly be interpreted as commenting on any political or social issue").

The FCC recites the mantra of "context" in an attempt to escape the irrationality of its flat presumption against two common words that it finds offensive, along with any of their variants. *See, e.g.*, Brief of Petitioner at 19-20, 30, 35. But as the foregoing examples demonstrate, the FCC's inscrutable and varying approach to regulating according to "context" means wielding essentially unbridled discretion. In claiming to know when an expletive should be allowed, the agency does not even purport to rely on data or any other evidence regarding when a child might be adversely affected, but instead finds it sufficient to rely on the personal tastes and cultural assumptions of the commissioners, as the record amply shows.

"Broadcasters are entitled to the same degree of clarity as other speakers" and the FCC cannot simply cite "context" to justify each decision to

sanction speech. *Fox II*, 613 F.3d at 329, 333. Although *Pacifica* discussed the relevance of context in regulating broadcast, it did so to emphasize the limited scope of its holding. 438 U.S. at 750; *Fox II*, 613 F.3d at 333. "[T]he FCC still must have discernible standards by which individual contexts are judged." 613 F.3d at 333.

How can it be permissible, for example, for a government agency to decide that a news program can use the word "bullshitter" but a police officer cursing during a fictional program such as "NYPD Blue" cannot? Why should it be possible that musicians would be barred from using vulgar words in a documentary, but perhaps allowed to use them on a news show?

Imposing on broadcasters the burden of demonstrating artistic or editorial necessity – as the FCC did in the case of "The Blues" – heightens the chill, compounding the injury. As this Court recognized in *Freedman v. Maryland*, 380 U.S. 51 (1965), the First Amendment has a procedural dimension, which prohibits laws or regulations that impose on speakers the burden of proving that their speech should not be censored. *See also Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004) ("[t]here is a potential for extraordinary harm and a serious chill upon protected speech" where prosecution is likely and "only an affirmative defense is available"). The FCC's notion that broadcasters should bear the burden of establishing artistic necessity turns the First Amendment upside down.

D. The Post 10-p.m. Safe Harbor Does Not Save the FCC's Censorship Regime

The post-10 p.m. safe harbor does not save the indecency regime from constitutional infirmity because it does not adequately protect the First Amendment rights of broadcasters, producers, directors, writers, and performers.

First, audiences are smaller late at night. TV viewing falls significantly after 10 p.m.; radio listening begins to shrink after 6 p.m. and drops to negligible levels by 10 p.m.[23] Second, the safe harbor realistically offers at most only two hours for programming that might run afoul of the FCC's rules, since most people are sleeping and not watching TV or listening to the radio from midnight to 6 a.m. It was not without reason that the D.C. Circuit referred to the safe harbor as "broadcasting Siberia." *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996).

Consigning possibly indecent programs to the post-10 p.m. safe harbor is rarely an adequate substitute for earlier time slots. Southern California

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[23] The Nielsen website lists the ten most-watched broadcast TV shows every week. For the week of October 17, 2011, none of the ten most-watched shows aired at or after 10 p.m. *See* Nielsen Media Research, *Top Tens and Trends, Television*, http://www.nielsen.com/us/en/insights/top10s.html (last accessed 10/31/2011). For radio, listening peaks around 7 a.m., "remains[s] strong" through 6 p.m., and tapers off after that, with just a tiny fraction of the daytime audience by 10 p.m. ARBITRON, RADIO TODAY 89 (2010 ed.), *available at* http://www.arbitron.com/downloads/RadioToday_2010.pdf.

Public Radio ("SCPR"), for example, for years broadcast performances at LA Theater Works, typically on Saturday nights at 8 pm – "consistent with when the curtain typically rises on the live performances." Kigin Affidavit ¶8 (A-212-213). In 2004, SCPR aired Theater Works' production of "Dinah Was," a Tony Award-winning play about singer Dinah Washington. "Not surprisingly," APM official Thomas Kigin says, "given Ms. Washington's life and times, the play contains various commonplace 'swear' words and sexual expressions." Heightened FCC censorship and the threat of large fines, however, made SCPR nervous. First, it stopped the broadcasts entirely; then, having concluded "that it is neither appropriate nor feasible to edit the performances for language," SCPR moved the broadcasts to 10 p.m. even though "broadcasts at this late hour will attract only a fraction of the former audience for this series of outstanding theatrical events." *Id.*

The "safe harbor" is even less of an adequate alternative for live programming. A letter submission in the FCC's remand proceeding explained: "Live broadcast television is a direct link to the real world around us, and while sometimes unpredictable, is nonetheless one of the things that continues to bring Americans together to share historic moments." Center for Creative Voices in Media *et al.*, Letter to William Davenport, No. DA 06-1739 (Sept. 21, 2006).

A safe harbor might have made sense under the facts of *Pacifica*, where one "specific broadcast ... represented a rather dramatic departure from traditional program content." *Reno*, 521 U.S. at 867.

But given the FCC's expanded and highly subjective censorship rules, and the pervasiveness of frank language in today's art, literature, news, and documentary programming, there is simply not enough time after 10 p.m. and before midnight to accommodate all of the constitutionally protected material that is endangered. This problem is exacerbated by the unpredictability and overbreadth of the FCC's indecency regime. Broadcasters, especially small or noncommercial broadcasters that cannot afford hundreds of thousands of dollars for a single indecency violation, must purge any expressive acts that might conceivably be offensive to a majority of FCC commissioners from their shows in order to air them before 10 p.m.[24]

As this Court recognized in *Reno*, programming that the FCC might consider indecent would have value for many minors. 521 U.S. at 877-78. Books by John Steinbeck and Toni Morrison, documentaries such as "The Blues," and news coverage that, the agency has warned in its *Remand Order*, might be found indecent are examples of valuable material that should not be consigned to the few available late-night hours.

In *Playboy*, this Court struck down a safe harbor requirement for sexually explicit material – a narrower category of speech than the potentially

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[24] Although time-shifting technologies such as TiVo make it possible to record late night programming for viewing at more convenient times, this technological advance has not led broadcasters to begin to air popular but potentially risky programs late at night; instead, they have self-censored in response to the fleeting expletives rule.

indecent speech at issue in this case. 529 U.S. at 812. *Playboy* involved cable TV, which enters the home exactly as broadcast television does for most Americans today. Indeed, the programming at issue in *Playboy* came into the home uninvited, largely in the form of "signal bleed." This Court nonetheless found that time channeling "silences ... protected speech for two-thirds of the day." *Id.* "It is of no moment," this Court explained, "that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." *Id.*

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

Steven R. Shapiro
Counsel of Record
Christopher A. Hansen
American Civil Liberties Union Foundation
125 Broad Street
New York, N.Y. 10004
(212) 549-2500
sshapiro@aclu.org

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* Counsel wishes to thank Marjorie Heins and Kathryn A. Wood for their substantial contributions to the brief.

ADDENDUM

STATEMENTS OF INTEREST

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization that has defended free speech principles since its founding in 1920. Of particular relevance here, the ACLU has participated in many of the leading cases challenging the government's efforts to restrict speech on the basis of "indecency," including *FCC v. Pacifica* and *Reno v. ACLU*.

The New York Civil Liberties Union (NYCLU) is a statewide affiliate of the national ACLU.

The American Booksellers Foundation for Free Expression (ABFFE) is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech.

The American Federation of Television and Radio Artists, AFL-CIO, (AFTRA) are the people who entertain and inform America. In 32 Locals across the country, AFTRA members work as actors, journalists, singers, dancers, announcers, hosts, comedians, disc jockeys, and other performers across the media industries including television, radio, cable, sound recordings, music videos, commercials, audiobooks, non-broadcast industrials, interactive games, the Internet, and other digital media. The 70,000 professional performers, broadcasters, and recording artists of AFTRA are working together to protect and improve their jobs, lives, and communities in the 21st century. From new art forms

to new technology, AFTRA members embrace change in their work and craft to enhance American culture and society.

Directors Guild of America (DGA) was founded in 1936 to protect the economic and creative rights of directors. Over the years its membership has expanded to include the directorial team - Unit Production Managers, Assistant Directors, Associate Directors, Stage Managers and Production Associates. Today, through the collective voice of more than 14,500 members, the Guild seeks to protect the rights of directorial teams, to contend for their creative freedom and strengthen their ability to develop meaningful and lifelong careers in film, tape and digital media.

Minnesota Public Radio (MPR) is a regional public radio network that serves some 1,000,000 listeners each week across seven states on 43 public radio stations. In addition, as American Public Media (APM), it produces more nationally distributed news and documentary programming than any other station-based public radio organization, reaching approximately 16 million people per week.

The National Alliance for Media Arts and Culture (NAMAC) is the national service organization for the media arts, providing leadership training and professional development, organizational capacity building support, and original research about the field. With more than 300 member organizations serving an estimated 400,000 film, video, audio, and digital creators, NAMAC has a strong interest in ensuring that language or gestures central to the meaning of film and audio works

remain intact and are not eliminated or altered when presented to the public.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 50 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensable to a healthy democracy. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

The National Federation of Community Broadcasters (NFCB) represents over 200 community-oriented radio stations across the United States. Community radio is committed to airing diverse, authentic voices and finds the current FCC indecency regulations inconsistent and overbroad. Since most community radio stations operate on small budgets, they cannot afford the fines that can now be charged for an inadvertent broadcast of something that the Commission might decide is indecent or profane, which has a chilling effect on their editorial freedom and ability to serve their communities.

PEN American Center (PEN) is an organization of over 2,900 novelists, poets, essayists, translators, playwrights, and editors. As part of International PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has taken a leading role in attacking rules that limit freedom of expression in this country.

Screen Actors Guild (SAG) is the nation's largest labor union representing working actors. Established in 1933, SAG represents over 125,000 performers who work in film and television, industrials, commercials, video games, music videos and other new media formats. SAG exists to enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights throughout the world. As many of SAG's members perform on broadcast television, they are directly affected by the FCC's censorship system.

Southern California Public Radio (SCPR) is a public radio network that serves some 600,000 listeners each week across Los Angeles, Orange County, the Inland Empire and the Coachella Valley.

The Tully Center for Free Speech is an academic center based at the S.I. Newhouse School of Public Communications at Syracuse University in Syracuse, New York. The center is charged with educating students and the public about First Amendment, free speech and free press issues.

Washington Area Lawyers for the Arts (WALA) is the largest provider of pro bono legal services and legal education on arts-related matters in the Washington, D.C., metropolitan area, annually serving hundreds of artists and artistic organizations. Through the work of attorney volunteers who regularly counsel low-income artists, the organization has observed directly the chilling effects on artists' free expression rights caused by vague and overreaching government censorship.

The Woodhull Freedom Foundation (WFF) is a non-profit organization that works to affirm sexual freedom as a fundamental human right by protecting and advancing freedom of speech and sexual expression. WFF promotes sexuality as a positive personal, social and moral value through research, advocacy, activism, education and outreach.

Writers Guild of America, West (WGAW) is a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television and new media industries. The court's decision will have a direct impact on the WGAW's members as content creators in broadcast television.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

ABC, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COLLEGE OF PEDIATRICIANS AND THE CHRISTIAN MEDICAL AND LEGAL ASSOCIATION IN SUPPORT OF PETITIONERS

Bryan H. Beauman
Counsel of Record
ALLIANCE DEFENSE FUND
P.O. Box 779
Paris, KY 40362
(859) 340-1127
bbeauman@telladf.org

Michael McCoin
31800 Northwestern Highway
Suite 350
Farmington Hills MI 48334

Counsel for Amici Curiae

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES III

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. TRADITIONALLY, AMERICAN LAW PROTECTED MORAL DECENCY AS AN IMPORTANT SOCIETAL VALUE. 4

II. IN MODERN TIMES, SUPREME COURT DECISIONS HAVE ELEVATED THE INDIVIDUAL INTEREST IN FREE EXPRESSION ABOVE THE SOCIETAL INTEREST IN MORAL DECENCY. 8

III. UP THROUGH THE 1990S, THE COURT RECOGNIZED THE ROLE THAT PUBLIC MORALITY MUST PLAY IN ITS JURISPRUDENCE. IN *BARNES V. GLEN THEATRE, INC.*, 501 U.S. 560 (1991), THIS COURT HELD IN A PLURALITY OPINION THAT STATE LAWS WERE RIGHTLY ATTUNED TO ISSUES OF PUBLIC MORALITY. *ID.* AT 569. *BARNES* QUESTIONED WHETHER AN INDIANA LAW OUTLAWING PUBLIC NUDITY VIOLATED THE FIRST AMENDMENT. CHIEF JUSTICE REHNQUIST, WRITING FOR THE PLURALITY, HELD THAT IT IS WELL WITHIN THE STATES' POLICE POWER

TO FASHION LAWS THAT SERVE TO PROTECT AND ENFORCE PUBLIC MORALITY. *ID.* WHILE THE PROPRIETORS OF THE STRIP CLUB ARGUED THAT NUDE DANCING WAS ARTISTIC EXPRESSION PROTECTED BY THE FIRST AMENDMENT, THE COURT, RELYING ON *ROTH*, REJECTED THAT NOTION. *ID.* THE PORNOGRAPHIC TREND HAS DEBASED OUR SOCIETY. 14

IV. THIS COURT HAS DETERMINED THAT TELEVISED INDECENCY HARMS CHILDREN. 17

V. TO THE EXTENT THE FCC SEEKS TO ENFORCE THE SOCIETAL VALUE OF MORAL DECENCY, THIS COURT SHOULD SUPPORT THIS EFFORT. 28

CONCLUSION 31

TABLE OF AUTHORITIES

Cases:

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002).....17

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991).....14

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942).....5-6

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403 U.S. 15 (1971).....12-14

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2 Serg. & R. 91 (Sup. Ct. Pa. 1815).....5

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370 U.S. 421 (1962).....16

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438 U.S. 749 (1978).....17

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390 U.S. 629 (1968).....10-11, 17

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521 U.S. 844 (1997).....18

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INTEREST OF *AMICI CURIAE*[1]

AMERICAN COLLEGE OF PEDIATRICIANS (the "College") is a not-for-profit national medical association of pediatricians and other healthcare professionals who specialize in the care of infants, children, and adolescents. The College was formed in 2002 to promote the welfare of children and is dedicated to ensuring all children reach their optimal physical and emotional well-being.

CHRISTIAN MEDICAL AND DENTAL ASSOCIATION ("CMDA") is a nonprofit national organization of Christian physicians and allied healthcare professionals with over 16,000 members. The genesis of the CMDA was formed in 1931. In addition to CMDA's physician members, CMDA has associate members from a number of allied healthcare professions, including nurses and physician assistants.

Amici's members believe that children are the future of our nation and should be reared in the best possible family environment and supported by physicians committed to ensuring their optimal health and well-being.

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[1] The parties have consented to the filing of amicus curiae briefs, copies of which have been filed with the Court. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation of or submission of this brief.

Amici are dedicated to educating parents, pediatricians, policy makers, and society about factors that are most likely to enhance a child's well-being. To that end, *Amici* publish position papers and policy statements on issues affecting children, families, and society using evidenced-based medical research and expert opinion to assist parents and influence childrearing. Consistent with that goal, *Amici* have filed briefs *amicus curiae* in cases dealing with parenting and the welfare of children.

SUMMARY OF THE ARGUMENT

A great societal interest exists in preserving standards of decency, particularly, as this court has reasoned, for programming broadcast into the home due to its uniquely pervasive presence and unique accessibility to children. As the courts have drifted away from protecting the societal interest in decency, television broadcasters have become more emboldened to produce indecent material.

Pertinent to *amici*'s interest is the devastating effect exposure to indecent programming has upon children and adolescents in our country. Scientific data plainly concludes that exposure to sexually-explicit or violent programming creates a high indicia of a host of emotional and physical deficits.

Amici ask the Court to recognize the important societal interest in protecting the standards of decency so long recognized in this country and to allow for the appropriate protection of the health detriments of children caused by exposure to indecency.

ARGUMENT

Introduction

Expanding free speech protection to various forms of indecent expression unwittingly triggered a vast cultural change in America. Our culture has been coarsened. Certainly, "[t]elevision is a primary and effective sex educator, regardless of whether the information is accurate or wanted." E.P. Benedek, M.D. and C. Brown, Ed.M., *No Excuses: Televised Pornography Harms Children*. Harvard Review of Psychiatry, 7:236-240, 238 (1999). Families, in the best interest of their children, attempt to shelter them from internet and television exposure to sexual material that they are not emotionally or psychologically ready to handle. More individuals are trapped in an addiction to sexually explicit materials, which fraudulently promises pleasure, but in fact undermines personal well-being and marital happiness. More and more women and children are abused as the exploited tools of gratification in pornographic images.

This degradation was accelerated, if not caused, by judgments that eroded the traditional legal support for moral decency. Scientific studies of the effect of television and sexual programming on children demonstrates the consequences of the move away from enforcing moral decency. The societal harms flowing from these decisions were predictable, indeed, were predicted in dissents and the precedents abandoned. Now that the predictions have come true, *Amici* respectfully submit that it is time for the Court to restore First Amendment free

speech jurisprudence to its traditional moorings. Upholding the enforcement authority of the Federal Communications Commission (the "FCC") in this case would be a first step in reversing decades of decline. Should this Court affirm the elimination of the FCC's enforcement, *Amici* fear that the effects of such a ruling would result in no restriction on the public airwaves and abrogate any broadcast decency standards.

I. Traditionally, American Law Protected Moral Decency as an Important Societal Value.

From the Founding until relatively recent times, American courts balanced individual free speech rights against society's interest in moral order. Indeed, the Founders considered the protection and advancement of morality to be a fundamental justification for protecting the freedoms of speech and press. First Continental Congress, Appeal to the Inhabitants of Quebec, 1774, quoted in THE HERITAGE GUIDE TO THE CONSTITUTION, 311-12 (Edwin Meese III, et al., eds., Washington, DC: Regnery Publishing, 2005). Free speech was not unlimited; it was to be protected to the extent that it furthered the search for truth and an increase in virtue among citizens and their officials. *Id.* at 312.

Early in the history of the Republic, courts consistently recognized the importance of protecting the virtue of society in general and the young in particular:

> Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful... and shall we form an exception in these particulars to the rest of the civilized world?

People v. Ruggles, 8 Johns 290 (Sup. Ct. N.Y. 1811). In a similar vein, the Pennsylvania Supreme Court wrote:

> The destruction of morality renders the power of the government invalid.... The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences.... No man is permitted to corrupt *the morals of the people.*

Commonwealth v. Sharpless, 1815 WL 1297, *8-9 (Sup. Ct. Pa. 1815) (emphasis added).

Likewise, this Court noted that because the fundamental purpose of the free speech guarantee was to foster the attainment of truth and public virtue, many forms of expression were simply considered outside the scope of First Amendment protection.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.

> These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by *the social interest in order and morality*.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (citations omitted; emphasis added).

This Court traditionally applied the First Amendment's freedom of speech guarantee in a way that fostered the explication of ideas. Expressions that did not make a constructive contribution to the exposition of ideas--such as profanity, blasphemy or fighting words--were simply not entitled to First Amendment protection. Accordingly, as recently as 1957, Supreme Court decisions followed the long-established view that indecency could not be condoned under the guise of free speech:

> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel and all of those States made either blasphemy or profanity, or both, statutory crimes.

Roth v. United States, 354 U.S. 476, 482 (1957) (citations omitted). The First Amendment safeguarded freedom of speech to assure society's interest in an unfettered interchange of ideas. *Id.* at 484. "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956." *Id.* at 484-485 (citations omitted).

Roth recognized that obscenity could be prosecuted without any showing of antisocial conduct posing a clear and present danger to public order. *Id.* at 486-87. The Court affirmed two obscenity convictions explicitly based on the "common conscience of the community." *Id.* at 490. To the *Roth* court, material was obscene if it had a substantial tendency to deprave or corrupt. *Id.* at 486. Thus, as of 1957, this Court continued to apply the First Amendment in a way that protected public morality as well as the free expression of socially worthwhile ideas. Protection of public decency remained a viable rationale for legislative action.

Justice Harlan, concurring in part in *Roth*, emphasized the right of a state legislature to protect public morality:

> It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual

> conduct which a State may deem obnoxious to the *moral fabric* of society.... The State can reasonably draw the inference that over a long period of time, the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on *moral standards*. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Id. at 501-02 (Harlan, concurring in part and dissenting in part; emphasis added). As of the time of this Court's decision in *Roth*, obscenity jurisprudence not only upheld notions of public morality, but allowed individual States the flexibility to determine their own moral standards.

II. In Modern Times, Supreme Court Decisions Have Elevated The Individual Interest In Free Expression Above the Societal Interest in Moral Decency.

The States' power to set moral standards began to diminish with *Jacobellis v. Ohio*, 378 U.S. 184 (1964), in which the Court determined that a national obscenity standard should apply. *Jacobellis* also held that obscenity was a question of law for the Supreme Court to decide, and so that deference to the findings of State juries and legislatures was inappropriate. *Id.* at 194-95. *Jacobellis* also turned the obscenity focus away from what was perceived to be good for the social moral order as a whole and toward perceived harm to children, instead. *Id.* at 195. *Jacobellis* tended to reduce the protection of

public decency by removing local control and focusing on the effect of pornography upon recipients (such as children) as opposed to the effect on moral decency in general.

Dissenting in *Jacobellis*, Chief Justice Warren viewed the task of the Court as "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely...." *Id.* at 199. The Chief Justice acknowledged "society's right to maintain its moral fiber." *Id.* at 202. He believed the reconciliation of interests would best be served by the application of local community standards as opposed to a national obscenity test. *Id.* at 202-03.

The moral conscience of the community, which was from the founding of the nation central to the Court's construction of the First Amendment, continued to fade from prominence. In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court reversed field on the importance of social value in the definition of obscenity. Previously, lewd and obscene materials were not considered to be within the First Amendment's protection precisely because they were "of such slight social value as a step to truth...." *Roth v. United States*, 354 U.S. at 485. But in *Memoirs*, the Court adopted the converse proposition, to wit, that if an otherwise obscene communication contained any material of redeeming social value, then it could not be banned without violating the First Amendment. *Memoirs vs. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion). After *Memoirs*, pornographers immunized their movies and books against obscenity convictions

by injecting small amounts of material that might be deemed to have "redeeming social value." By this contrivance, publishers of indecent material cloaked themselves with First Amendment protection.

In the late 1960s, the Court handed down dozens of decisions that "elevated pornography and other assaults on decency to the level of a First Amendment right. The Supreme Court reversed dozens of judges, juries, and appellate courts in sixteen states, made laws against obscenity unenforceable, and lowered drastically the standards of decency in communities throughout America." Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 95, 97 (2008). Many of these decisions were issued *per curiam*, without any recitation of the pornographic material being granted First Amendment protection, and simply citing *Redrup v. New York*, 386 U.S. 767 (1967) (*per curiam*), as their sole justification. At least 27 Supreme Court pornography decisions were issued anonymously during this period, "suggest[ing] that the Justices could not defend the obscenity that they used the First Amendment to protect." Schlafly, *supra*, at 99.

While adopting an "anything goes" approach for pornography sold to adults, the Court applied a more stringent standard for material being sold to minors. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a conviction under a New York criminal obscenity statute that prohibited the sale of obscene material to minors under 17 years of age. In doing so, the Court determined that the "girlie" magazines were not obscene for adult viewers, citing

Redrup v. New York. Nevertheless, the Court held the conviction proper because the magazines were being sold to children under 17. The Court recognized that the state legislature could reasonably find that minors' exposure to such material might be harmful. *Ginsberg*, 390 U.S. at 639.

Ironically, the *Ginsberg* decision tended to weaken, rather than strengthen, legislative efforts to protect decency. Just as the "redeeming social value" test was turned on its head to expand First Amendment protection of pornography, the "danger to children" test tended to open the floodgates to pornography aimed at adults. In both cases, the Court's rationale tended to broaden the protection of indecent material and reject public decency as a legitimate legislative interest.

The motion picture industry responded overnight to the new, more permissive treatment of pornography. "The results of the Academy Awards reflected this abrupt change. In 1965, the Best Picture was *The Sound of Music*; in 1969, the Best Picture was *Midnight Cowboy*, an X-rated film about a homeless male hustler. This new freedom brought obscene language, near-total nudity, graphic sex scenes, and sadistic violence to neighborhood movie theatres." Schlafly, *supra*, at 99-100 (footnote omitted).

Miller v. California, 413 U.S. 15 (1973), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), attempted to slow the growth of pornography. In *Miller*, the Court overruled the *Memoirs* test that to

sustain a conviction for obscenity, a prosecutor must prove that the material in question is "utterly without redeeming social value." *Miller*, 413 U.S. at 21. The Court attempted to restore the presumption that obscene material lacked redeeming social value. "It was nearly impossible, however, to turn back the tide of pornography; the damage was already done and continues to this day." Schlafly, *supra,* at 101.

In *Paris Adult Theatre*, 413 U.S. 49 (1973), the Court attempted to reaffirm the lost emphasis on general decency as a valid legislative concern:

> In particular, we hold that there are legitimate State interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.... [The public has an interest] in the quality of life and the total community environment....

Id., 413 U.S. at 57-58 (citations omitted). The Court said that while an individual may be entitled to read an obscene book in private, making the obscene book available to him inevitably intrudes upon other citizens. *Id.* at 59 (citation omitted).

The cause of public decency suffered a setback in *Cohen v. California*, 403 U.S. 15 (1971), a case that "threw First Amendment protection around a man who wore into a courthouse a jacket suggesting, with a short Anglo-Saxon verb, that the reader perform a sexual act of extreme anatomical implausibility with the Selective Service System." Robert H. Bork,

COERCING VIRTUE, 61-62 (Washington, DC: AEI Press, 2003). Although the jacket was undeniably offensive and was being worn in a public place where women and children were present, the Court found that California's effort to excise this scurrilous epithet was unconstitutional. The Court rationalized its decision by saying that people in the courthouse could simply avert their eyes. *Cohen*, 403 U.S. at 21. The Court emphasized the importance of freedom of speech:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope of use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 24 (citation omitted). The Court did not explain, however, how the profanity at issue might help produce a more capable citizenry or comport with human dignity.

The *Cohen* Court was unable to distinguish between the vulgar word at issue and words that might acceptably be used to further public discourse. "For, while the particular four-letter word being litigated here is perhaps more distasteful than most

others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* at 25. Thus did the Court inject moral relativism into First Amendment jurisprudence. Robert H. Bork, SLOUCHING TOWARDS GOMORRAH, 99 (New York: Regan Books, 1997).

III. Up through the 1990s, the Court recognized the role that public morality must play in its jurisprudence. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), this Court held in a plurality opinion that state laws were rightly attuned to issues of public morality. *Id.* at 569. *Barnes* questioned whether an Indiana law outlawing public nudity violated the First Amendment. Chief Justice Rehnquist, writing for the plurality, held that it is well within the States' police power to fashion laws that serve to protect and enforce public morality. *Id.* While the proprietors of the strip club argued that nude dancing was artistic expression protected by the First Amendment, the Court, relying on *Roth*, rejected that notion. *Id.* The Pornographic Trend Has Debased Our Society.

By failing to distinguish between offensive vulgarities and expressions that contribute to the exposition of ideas, seemingly "the Court, without any authority in the Constitution or any law, has forced Americans to adopt the Court's view of morality rather than their own." Bork, GOMORRAH, *supra*, at 114. As such, the Court itself, in its "solicitude for aberrant individuals," has infringed

upon the right of society at large to maintain the majority's notions of decency and not have such content thrust upon them. Bork, GOMORRAH, *supra*, at 105. This is what the late Senator Daniel Patrick Moynihan called "defining deviancy down." Daniel Patrick Moyinhan, *Defining Deviancy Down*, THE AMERICAN SCHOLAR, 17 (Winter 1993), cited in BORK, GOMORRAH, *supra*, at 3. Judge Bork described the cultural decline as follows:

> With each new evidence of deterioration, we lament for a moment, and then become accustomed to it. We hear one day of the latest rap song calling for killing policemen or the sexual mutilation of women;... then of the latest homicide figures for New York City, Los Angeles, or the District of Columbia; of the collapse of the criminal justice system...; of the rising rate of illegitimate births; the uninhibited display of sexuality and the popularization of violence in our entertainment; worsening racial tensions; ... -- the list could be extended almost indefinitely.
>
> So unrelenting is the assault on our sensibilities that many of us grow NUMB, finding resignation to be the rational, adaptive response to an environment that is increasingly polluted and apparently beyond our control.

BORK, GOMORRAH, *supra*, at 2-3.

Modern American culture no longer possesses the disciplinary tools of shame and stigma to restrain the most primitive human emotions. BORK, GOMORRAH, *supra*, at 125. It is not surprising that the cultural decline has spread to television.

> Television, not surprisingly, displays the same traits as the movies and music.... Language is increasingly vulgar.... Recreational sex... is pervasive and is presented as acceptable about six times as often as it is rejected.... Television takes a neutral attitude toward adultery, prostitution and pornography. It 'warns against the dangers of imposing the majority's restrictive sexual morality on these practices. The villains in TV's moralist plays are not deviants and libertines but Puritans and prudes.' The moral relativism of the Sixties is now television's public morality.

BORK, GOMORRAH, *supra*, at 127 (citation omitted).

While the Court expanded First Amendment protection for pornography and other vulgar expressions, it has restricted First Amendment protections for religious expressions. *Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding voluntary, non-denominational school prayer); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (forbidding voluntary Bible reading to open the school day); *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting posters of the Ten Commandments in schools); and *Wallace v. Jaffree*, 472 U.S. 38 (1984)

(forbidding one-minute period of silence in school). As the Court gradually adopted an expansive view of the so-called "wall of separation between church and state," its willingness to apply traditional moral values under the Free Speech clause diminished. This, in turn, led to some surprising outcomes. For example, because the Court's rationale in forbidding child pornography was only to protect child victims, and not to vindicate any societal moral interest, virtual (simulated) child pornography is protected as free speech. *U.S. v. Williams*, 553 U.S. 285 (2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51 (2002).

IV. This Court has Determined that Televised Indecency Harms Children.

Constitutional law presumes that indecent material is harmful to children. *FCC v. Pacifica Foundation*, 438 U.S. 749 (1978). As the Court noted in *Pacifica*, the government's interest in the well-being of its youth justified the Federal Communication Commission's regulation of indecent language even though the FCC had not quantified any measure of harm caused by the indecent language. *FCC v. Fox TV Stations, Inc.*, __ U.S. __, 129 S.Ct. 1800, 1813-1814 (2009) (citing *Pacifica*, 438 U.S. 749 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968)).

The presumption is evident throughout indecency case law. In *Sable*, this Court stated: "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors

from the influence of literature that is not obscene by adult standards." *Sable Commun. of Cal., Inc., v. Fed. Commun. Commn*, 492 U.S. 115 (1989). In *Reno*, this Court drew a distinction between indecent material for adults versus children, again presuming that indecent material is harmful to children. *Reno v. ACLU*, 521 U.S. 844 (1997).

This Constitutional presumption that indecency harms children is further validated by common sense and the great weight of numerous studies regarding the effects of media on children. In this context, consider then the impact of the ruling below and the potential result of the elimination of any indecency restrictions on broadcast television programming.

The average American child or teenager watches nearly three hours of television per day. Policy Statement, American Academy of Pediatrics, Committee on Public Education, *Children, Adolescents, and Television*, PEDIATRICS, Vol. 107 No. 2 (Feb. 2001) at 423. About one-third of 2- to 7-year-olds and about two-thirds of 8- to 18-year-olds have television sets in their bedrooms. *Id.* Because v-chips (assuming that v-chip technology even operates as intended) are only installed in TVs with screens above 13 inches, and because smaller TVs tend to get consigned to kids' bedrooms, the development of v-chip technology does not effectively guard children from unsuitable program content. *Id.* According to scientific research, teenagers with bedroom TVs are more likely to engage in substance use and sexual activity. Policy Statement, American Academy of Pediatrics, *Sexuality, Contraception, and*

the Media, PEDIATRICS, Vol. 126, No. 3 (Sept. 2010) at 579. Because these teenagers are more likely to have televisions without v-chips (or effective v-chip technology) only exacerbates this problem.

Surely there can be no real dispute to the premise that children and adolescents are vulnerable to TV messages. *Children, Adolescents, and Television*, PEDIATRICS, Vol. 107 No. 2 at 423. Younger children cannot discriminate between televised fiction and reality. *Id.* In the teen years, TV becomes an integral part of the cultural environment, in effect a "super peer," influencing norms, perceptions and behaviors. Kunkel, D., *et al.*, *Sex on TV 4*, Kaiser Family Foundation, 2005, at 5. Thus, the content of the programming on television plays an enormous role in the life of children and adolescents and becomes a tremendous influence on behavior.

More than 75% of prime-time TV programs present sexual material, typically without any hint of risk or responsibility. *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126 No. 3 at 576-77. Approximately 14% of TV programs either show or strongly suggest acts of intercourse. Collins, R.L., *et al.*, *Watching Sex on Television Predicts Adolescent Initiation of Sexual Behavior*, PEDIATRICS, Vol. 114, No. 3, Sept. 2004 at e281, http://stopteenpregnancy.org/pdf/Watching%20Sex%20on%20TV%20Predicts%20Adolescent%20Initiation%20of%20Sexual%20Behavior.pdf. The amount of sexual TV content nearly doubled from the 1997-98 season to 2004-05, making sex on TV "nearly ubiquitous." Kunkel, D., *et al.*, *Sex on TV 4*, Kaiser

Family Foundation, 2005, at 58. This data is derived from a time where decency regulations were in place. It is troubling to contemplate the amount of sexually explicit programming that will be broadcast should the resulting decision of this Court in effect eliminate any indecency regulation.

As this Court previously recognized, for good reason there is not a significant number of empirical studies on the topic of exposure to children of indecent programming. Yet, this Court has pointed out that common sense alone establishes that indecency is harmful to children:

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency...Here it suffices to know that children mimic the behavior they observe-or at least the behavior that is presented to them as normal and appropriate...Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.

FCC v. Fox TV Stations, Inc., __ U.S. __, 129 S. Ct. 1800, 1813 (2009).

Despite the practical limitations of conducting such studies, some empirical research has been completed which demonstrates the effect of indecent programming, with very troubling findings. The results of televised indecent programming most concerning to *Amici* as well as any clinician or parent are:

> modeling and imitation of language heard and behaviors observed in televised pornography; negative interference with children's normal sexual development; emotional reactions such as nightmares and feelings of anxiety, guilt, confusion, and/or shame; stimulation of premature sexual activity; development of unrealistic, misleading, and /or harmful attitudes toward sex and adult male-female relationships; and undermining of family values with resultant conflict between parents and children.

E.P. Benedek, M.D. and C. Brown, Ed.M., *No Excuses: Televised Pornography Harms Children*. HARVARD REVIEW OF PSYCHIATRY 1999; 7:236-240, 239. [2]

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[2] Use of the term "pornographic" often creates confusion and inconsistency. For the purposes of the scientific study cited here, the term "pornographic" refers to material "predominantly sexually explicit and intended primarily for the purpose of sexual arousal." *Id.* at 237.

Longitudinal studies show that sexual material on television harms children in multiple ways. Scientific research reveals negative health effects in the areas of violent and aggressive behavior, premature sexuality, and poor school performance. *Children, Adolescents, and Television*, PEDIATRICS, Vol. 107, No. 2, at 423.

Children up to nine years of age are unable to completely discern the difference between sexual activity and violence "because they do not understand what sex is, and sexual behavior looks violent to them because of the intense, repetitive and unfamiliar movements." E.P. Benedek, M.D. and C. Brown, Ed.M., *No Excuses: Televised Pornography Harms Children. Harvard Review of Psychiatry* 1999; 7:236-240, 237. Thus, when children view explicit sexual activity on television they "may perceive it as violence [which] may be as traumatizing as seeing actual violence, and sleep disturbance, nightmares, and regressive behavior may result." *Id.*

Not surprisingly, as any parent knows, children frequently imitate the language and sounds that they observe, even those heard on television. Such behavior is observable "even in infants as young as 14 months of age [who] incorporate behaviors that they see on television." *Id.*, at 238. Accordingly, "modeling theory" provides a further causal link between harmful exposure to televised pornography and early sexual activity.

The potential harm to children in being exposed to indecent programming is not limited to modeling

the behavior. Rather, exposure to sexually laden content shapes adolescent attitudes and mores. Psychologists have pointed out that children learn how to have relationships based on what they see, and when they see heavy doses of indecent sexual content, it harms their ability to develop more caring relationships:

> The problem is that the sexualized childhood is harming young children at the time when the foundations for later sexual behavior and relationships are being laid...They are forced to deal with sexual issues when they are too young, when the way they think leaves them vulnerable to soaking up the messages that surround them with few resources to resist. Girls learn to judge themselves and others based on how they look; in essence they learn to see themselves as objects. And boys learn to judge them this way as well. The resulting objectification undermines their ability to have connected, caring relationships, which will, in turn, harm their ability to have caring relationships in which sex is a part when they grow up.

Diane E. Levin, Ph.D. and Jean Kilbourne, Ed.D. *So Sexy So Soon: The New Sexualized Childhood and what Parents Can Do to Protect Their Kids*, 63-64 (Ballantine Books, N.Y. 2008).

Because of the predominance of sexual content on TV, there is also a strong correlation between childhood and adolescent TV viewing and early sexual activity. *Watching Sex on Television Predicts*

Adolescent Initiation of Sexual Behavior, PEDIATRICS, Vol. 114, No. 3, at e281. The heavier the dose of sexual material on television, the earlier the initiation of intercourse and other such activities.

Adolescence is an important stage in sexual development when young people "begin to consider which sexual behaviors are enjoyable, moral, and appropriate for their age group." *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 at 576. Exposure of children to sexual activity "may legitimatize certain sexual behavior and counteract societal prohibitions concerning such conduct." E.P. Benedek, M.D. and C. Brown, Ed.M., at 238.

Scientific studies show that sexual content in TV and other media tends to encourage earlier sexual activity in young people. *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 at 578. Those exposed to sexual material in early adolescence are twice as likely to have early sexual intercourse. *Id.* Thus, it is not surprising that children who view adult programs are likely to have intercourse earlier than those who have not been subjected to these programs. *Id.*

In a separate national study of nearly 1800 adolescents ages 12 to 17, researchers concluded that "watching sex on TV predicts and may hasten adolescent sexual initiation." *Watching Sex on Television Predicts Adolescent Initiation of Sexual Behavior*, PEDIATRICS, Vol. 114, No. 3, at e280. The results showed that heavy exposure to sexual

content[3] on TV related strongly to teen's initiation of intercourse or their progression to more advanced sexual activities apart from intercourse in the following year. Those who watched the greatest amount of sexual content were twice as likely than those who viewed the least amount to initiate sexual intercourse during the following year or to progress to more-advanced levels of other sexual activity. *Id.*, at e287. "Reducing the amount of sexual content in entertainment programming, reducing adolescent exposure to this content, or increasing references to and depictions of possible negative consequences of sexual activity could appreciably delay the initiation of coital and noncoital activities." *Id.*, at e280.

It is important to recognize that TV programs containing mere discussions about sex were just as likely to accelerate teen sexual activity as those with actual depictions of sexual acts. *Sex on TV 4*, at 6. Observing talk about sex has been shown to influence adolescent viewers' beliefs about normative sexual patterns and practices, expectations about how sexual relationships evolve and attitudes toward casual sex. *Id.* at 57. *See also Watching Sex on Television Predicts Adolescent Initiation of Sexual Behavior*, PEDIATRICS, Vol. 114, No. 3, at e287 ("It apparently makes little difference whether a TV show presents people talking about whether they

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[3] In this study, the term "sexual content" measured three kinds of sexual content on TV: 1) sexual behavior, such as kissing, intimate touching, and implied and depicted intercourse, 2) talk about sexual plans or desires or about sex that has occurred, and expert advice, and 3) talk about behavior showing the risks of or the need for safety in regard to sexual activity. *Id. e282.*

have sex or shows them actually having sex. Both affect perceived norms regarding sex, and this sexual behavior").

The results of increased sexual activity in adolescence are far reaching. In surveys, most of the young people who have become sexually active wish they had waited, indicating that they were not yet emotionally ready. *Id.* More recent, a 2009 study found that two-thirds of sexually experienced teenagers in the United States say they wish they had waited longer to have intercourse for the first time. Martino, S.C. et al., *It's better on TV: does television set teenagers up for regret following sexual initiation?* PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 41(2):92-100 (June 2009).

Earlier sexual activity increases the likelihood of accidental pregnancy and the United States has one of the highest rates of teen pregnancy in the world. Policy Statement, American Academy of Pediatrics, *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 (Sept. 2010) at 576. The birthrate among unwed girls ages 15-19 ranged from 13 to 16 per thousand in the period 1951-63. From 1963 to 1993, the rate soared from approximately 15 per thousand to 45 per thousand. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STATISTICAL ABSTRACT OF THE UNITED STATES, cited in David Barton, ORIGINAL INTENT, 242 (Aledo, TX: WallBuilder Press, 2000). The birthrate among unwed girls ages 15-19 peaked at almost 60 per thousand in 1990. Statistical Abstract of the United States, http://www.census.gov/compendia/statab/tables/08s0083.xls.

Further, early exposure to sexual media doubles the risk of teen pregnancy. *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 at 578. Frequency of exposure to sexual themes on TV is a correlative predictor of early pregnancy. Chandra, A., *et al.*, *Does Watching Sex on Television Predict Teen Pregnancy? Findings from a National Longitudinal Survey of Youth*, PEDIATRICS, Vol. 122, No. 5 (Nov. 1, 2008) at 1047-54. The study authors concluded, "Our results suggest that television may have a substantial role in the high rates of teenage pregnancy in the United States. High rates of exposure corresponded to twice the rate of observed pregnancies seen with low rates of exposure." *Id.*

Another important consequence of the rising tide of sexual material on television is an increase in venereal diseases. One out of every four sexually active teenagers contracts a sexually transmitted disease (STD) annually. *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 at 576. Young people between 15 and 24 years of age comprise only one-fourth of the sexually active population, but they are responsible for almost half of the STD diagnoses per year. *Id.* Incidence of gonorrhea in the 10-14 age group was below 18 cases per 100,000 population from 1956 to 1963. From 1963 to 1993, it increased dramatically, reaching 70 cases per 100,000 in 1990. U.S. CENTER FOR DISEASE CONTROL AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, cited in BARTON, ORIGINAL INTENT, *supra*, at 244.

Likewise, family stability as measured by two-parent households decreased. During the period 1950-1963, single parent households in the United States were fewer than 5 million. By 1994, this number exceeded 12 million. STATISTICAL ABSTRACT OF THE UNITED STATES, DEPARTMENT OF COMMERCE CENSUS BUREAU, cited in Barton, ORIGINAL INTENT, *supra*, at 246. By 2006 the United States had over 19 million single parent households, 14 million headed by unmarried women. http://www.census.gov/compendia/statab/tables/08s0058.xls.

The consequences of children and adolescents being confronted with the ever increasing graphic nature of sexual material on television have very real consequences for individuals, their families, and for society as a whole. The scientific data is unambiguous on this point. The crux of the matter is that as the Court increased Constitutional protection for individual expression without regard to morality, sexual material proliferated on television and in other media. It is time to recognize the error in this move. Sex on TV has had negative societal consequences, particularly on American children.

V. To the Extent the FCC Seeks To Enforce the Societal Value of Moral Decency, This Court Should Support this Effort.

It is against this background that *Amici*, the American College of Pediatricians and the Christian Medical and Dental Association, respectfully submit that the Court reconsider the reasoning behind its

prior rulings in the area of public decency. By giving First Amendment priority to purveyors of indecent speech, the Court has unwittingly condoned a coarsening of our society. This obviously affects not only American children -- middle school assignments often include books containing sex, immoral behavior and profanity, Schlafly, *supra,* at 102 -- but society as a whole. It is not only children who are debased by an environment of sexual immorality. As we have seen, "over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." *Roth v. United States*, 354 U.S. at 502 (Harlan, J., concurring in part and dissenting in part).

Legislative restrictions on vulgar expressions are essential to the maintenance of public decency, because unrestrained human desires often tend toward the indecent. Writing about unsavory entertainment, Judge Bork said:

> The entertainment industry is not forcing depravity on an unwilling American public. The demand for decadence is there. That fact does not excuse those who sell such degraded material any more than the demand for crack cocaine excuses the crack dealer. But we must be reminded that the fault is in ourselves, in human nature not constrained by external forces.

Bork, GOMORRAH, *supra*, at 132. The "external forces" necessary to restrain the baser desires -- governmental limits on vulgar and obscene

expressions -- have largely been abrogated by the decisions of this Court. They can only be restored by this Court.

The Federal Communications Commission's challenged action is only a tiny step in the direction of restoring moral decency in modern American culture. The FCC only attempts to regulate indecent broadcasts between the hours of 6 a.m. and 10 p.m., though the relevant statute makes no such distinction. 18 U.S.C. 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").Even fleeting vulgarities contribute to the coarsening of our culture. To the extent the Commission has determined that even a fleeting expletive constituted a harmful blow to public decency, its finding should be sustained.

It is futile to argue that society cannot legislate morality. In fact, all legislation is an expression of a society's morality. By striking down so many legislative pronouncements designed to support public morality, this Court "has dictated *immorality* through First Amendment jurisprudence." Schlafly, *supra*, at 95.

By expanding protection of pornography and other vulgarities while restricting public religious expression, this Court has had a profound effect on what one scholar has termed our "moral ecology." Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford Univ. Press, 1994). The Founders considered public morality

indispensable to the maintenance of a free society. As President John Adams stated:

> [W]e have no government armed with power capable of contending with human passions unbridled by morality and religion.... Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.

John Adams, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, 229 (Charles Frances Adams, ed., Boston: Little, Brown and Company, 1854), Vol. IX, cited in Barton, ORIGINAL INTENT, *supra,* at 319. In a similar vein, Benjamin Franklin said, "[o]nly a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters." Benjamin Franklin, THE WORKS OF BENJAMIN FRANKLIN, 297 (Jared Sparks, ed., Boston: Tappan, Whittimore and Mason, 1840), Vol. X, cited in Barton, ORIGINAL INTENT, *supra,* at 321. The wisdom of our Founders and the cultural decline of the last fifty years suggest that the societal interest in decency and virtue is worthy of legal protection. To the extent the challenged FCC decision is an effort to support public morality, the public interest demands that it be sustained.

CONCLUSION

For the foregoing reasons, the *Amici* request the Court reverse the court below and hold that the FCC's broadcast indecency regulations are constitutional.

Respectfully submitted,

Bryan H. Beauman
Counsel of Record
ALLIANCE DEFENSE FUND
P.O. Box 779
Paris, KY 40362
(859) 340-1127
bbeauman@telladf.org

Michael McCoin
31800 Northwestern
Highway
Suite 350
Farmington Hills MI
48334

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evidence of the need to maintain or strengthen broadcast decency standards.[33] Children learn how to behave by watching the behavior of others and it is easer to imitate verbal aggression than physical violence.[34] Therefore, hearing television characters utter obscenities at each other teaches children that profanity is how people interact with each other. Viewers are influenced by behaviors they view most often, the reactions or consequences of such behaviors and what they can most easily imitate in their own lives.[35] Viewers who see television characters being reinforced for using expletives are more likely to perform the observed behavior.[36] This is particularly true of children who mimic what they observe without having sufficient frontal brain development to process the consequences of the behavior. Repeated exposure to coarse language leads to imitation and desensitization.[37] Desensitization then facilitates increased use and greater

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33 Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 J. OF BROAD. & ELEC. MEDIA 554 (2004).

34 *Id.* at 557.

35 *Id.*

36 *Id.*

37 *Id.*

acceptance of profanity in everyday conversations and an increase in the amount of indecent language scripted for television.[38] So the vicious cycle continues and the levels and nature of profanity continue to increase and broadcasters zealously seek to push the envelope further and further, as is apparent in this case.

The escalation of profanity in broadcasting creates more than noise pollution. The use of insulting language is connected to a personality trait known as verbal aggressiveness, which reflects a person's tendency to attack another's self-concept in order to inflict psychological pain.[39] Verbal aggression is a highly destructive form of communication behavior that is designed to threaten and inflict harm.[40] Verbal aggressiveness damages the receiver's self-esteem and can be a catalyst for domestic abuse, alcoholism and substance abuse.[41] Profanity or cursing is a form of low-level

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38 *Id.*

39 Marina Krcmar & Steve Sohn, *The Role of Bleeps and Warnings in Viewers' Perceptions of On-Air Cursing*, 48 J. OF BROAD. & ELEC. MEDIA, 570, 574 (2004).

40 *Id.* at 574-75.

41 *Id.*

aggression that can, and often does, escalate into higher levels of aggression and physical harm.[42] Cursing is used to stigmatize or derogate certain groups considered "unpopular."[43] Cursing is also used to express prejudice through the use of racial, religious or sexual slurs or to express frustration, which can quickly escalate to dangerous levels of aggression.[44] Profanity is also used to gain attention, intimidate, rebel or impress peers.[45] This is particularly true of older children who will want to fit in with a certain crowd or be seen as "cool" and will mimic language heard on popular television shows.

Research shows that children as young as two can mimic these words, which, as discussed above, can become wired into their developing brains.[46] Studies show that children might know as many as four indecent words by the time they are two, 20 by the age of four and 30 to 40 by the age of ten.[47]

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42 Arnold P. Goldstein, *The Psychology of Group Aggression* 54 (2002).

43 *Id.* at 55.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

To the extent that the FCC's decency standards can reduce these statistics, or even prevent them from rising, they serve a compelling state interest in diminishing aggressive behavior and protecting the well-being of all citizens, but particularly children. The documented adverse effects of the proliferation of indecent language offer a convincing argument against jettisoning the standards to suit broadcasters' desires. Increasing the amount of profanity on the public airwaves and consequently in society cannot be considered to be in the public interest. As the studies discussed above (related to the escalation of language as a low-level aggression into higher levels of aggression) indicate, increasing or even maintaining the current level of indecent language in the culture will exacerbate higher level aggressive and antisocial behavior. In addition, the evidence that the amount of indecent language in programming increased after implementation of the existing rating system shows that removing standards will only increase the problem further. If broadcasters see the ratings as a license to include more profanity because the audience has been forewarned, then if they are unrestricted they will take even further license with language. As guardian of the public's interest in the airwaves, the FCC has a legal,

even moral [as in right conduct being healthful conduct] obligation to decrease the detrimental effects of programming. Decency standards help fulfill that obligation. Broadcasters should not be permitted to jettison those standards in their race to out-offend their cable competitors, increase profits and regain market share.

B. The Increased Frequency of Indecent Words During Prime Time Broadcasts Points To The Need To Maintain Or Strengthen, Not Lessen, Decency Standards To Protect The Public's Interest.

Even with the decency standards in place, broadcasters have continued to push the envelope of acceptable language in order to compete with their cable television competitors.[48] The use of indecent words has escalated over time.[49] One study showed a 51 percent increase in "curse words," to about one per eight minutes in prime time, between 1997 and 2001.[50] The study showed that the "seven dirty words" made famous by George Carlin

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48 Kaye & Saplosky at 557, 566.

49 *Id.* at 566

50 *Id.*

were spoken about once every three hours.[51] Programs rated "TV-PG" contained 58 percent of the foul language spoken in the 2001 program sample and there were more instances of the "seven dirty words," excretory and strong curse words in TV-PG programs than in TV-14 programs.[52]

A later study by the same researchers showed that bullying language in prime time continued to coarsen.[53] Ninety percent of programs on both broadcast and cable networks contained at least one indecent word or phrase.[54] Use of the "seven dirty words" increased from two percent of the indecent language to sixteen percent.[55] Even with the restrictions in place, broadcasters arguably deliberately air more indecent words during hours when children watch, during each of the two hours between 8 p.m. and 10 p.m. than

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51 *Id.*

52 *Id.* at 564.

53 Barbara K. Kaye & Barry S. Sapolsky, *Taboo or Not Taboo? That is the Question: Offensive Language on Prime-Time Broadcast and Cable Programming*, 53 J. of BROAD. & ELEC. MEDIA 1 (2009).

54 *Id.* at 7.

55 *Id.*

during the 10 p.m. to 11 p.m. hour.[56] The "seven dirty words" are uttered 5.5 times more often in the 8 p.m. to 9 p.m. hour.[57] Easing or jettisoning the decency standards would only exacerbate the willful proliferations of profanity and the associated adverse effects for society, which reach far beyond television programming.[58]

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[56] *Id.* at 11-13

[57] *Id.*

[58] As the indecent language becomes prolific, it enters into the larger political and social discourse and is used to disparage and threaten public servants who disagree with a particular position. For example, homosexual advocates utilize foul language to disparage sitting members of Congress, presidential candidates and prominent ministers who oppose same-sex marriage. *See, e.g.*, *Mass Resistance Update*, (August 12, 2011), http://www.massresistance.org/docs/gen/11c/it_gets_better/index.html (last visited August 19, 2011).

C. Profanity Is Used As A Tool For Sexual Harassment And Assault So Stemming Its Proliferation Through Decency Standards Serves The State's Compelling Interest In Protecting Its Citizens.

Those engaged in sexual harassment or sexual assault frequently use indecent language to bully, as part of their degradation and humiliation of the victims, pointing to another justification for restricting the broadcasting of such language over the public airwaves.

The Ninth Circuit found that "sexual or gender-based conduct which is abusive, humiliating, or threatening violates Title VII even if it does not cause diagnosed psychological injury to the victim. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994). "It is enough, rather, if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position." *Id.* In *Steiner*, the casino manager habitually referred to her and to other female employees in a derogatory fashion using sexually explicit and offensive terms, including

that he would "hate to terminate someone with big boobs." *Id.* The court noted that the manager's comment were "sexually explicit, offensive, highly derogatory, and publicly made." *Id.* Notably, the manager testified that he had spoken that way all of his life. *Id.* That indicates that the manager had heard and absorbed "sexually explicit" and "offensive" language at a very young age and that it had become engrained into his developing brain.

A history of vulgar and indecent language directed toward women employees at a Hertz rental car agency was sufficient to prove liability for sex discrimination. *Sones Morgan v. Hertz Corp.*, 542 F. Supp. 123, 128 (W.D. Tenn. 1981), *aff'd sub nom.*, *Sones-Morgan v. Hertz Corp.*, 725 F.2d 1070 (6th Cir. 1984). "The proof is clear that the order of the day at Hertz is for supervisory men employees to address questions about sexual activity and preference to women rental representatives." *Id.* "The Court is of the opinion that the addressing of sexually indecent comments to female employees is a form of sexual harassment and discrimination prohibited by Title VII of the Civil Rights Act of 1964, and that an injunction should issue against Hertz, its agents, servants and employees, restraining them from these kinds of comments. By this the Court means remarks such as 'Did you get any

over the weekend?'" *Id.* There was no specific evidence that the guilty parties had used such language all their life, as was true in *Steiner*. However, the prolific use of indecent language in the workplace points to ubiquity of the words in popular culture and the value of reducing the frequency of such bullying language.

A graphic example of the effect of indecent language on young people is presented in *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1366 (3d Cir. 1992). Two female students in a graphic arts class alleged that several male students in the same class physically, verbally and sexually molested them repeatedly. *Id.* The defendants used obscene words and gestures toward the students and the female teacher, who was also physically abused by the boys. *Id.* The conduct took place on an average of two to four times per week from January to May and included sex acts and forced observation of sex acts performed on other students. *Id.* These middle school students had certainly heard the indecent language at some time in their childhood, had connected it to images and acted out those images on their fellow students.

The FCC decency standards would not necessarily prevent any similar tragedies in the future. However, to the extent that they lessen young people's exposure to the indecent

language and images that can trigger such behavior, they serve the state's compelling interest in protecting the physical and psychological well-being of its citizens, especially children.

D. Maintaining Decency Standards Helps Stop Popular Culture From Sliding Into "The Abyss of Human Decadence."

The late Sen. Robert Byrd cogently described why the decency standards should remain in place.

> The political and social environment in which parents must today raise their children is, unfortunately, an environment in which *anything goes* .... Profanity, vulgarity, sex and violence are pervasive in television programming, in the movies, and in much of today's books that pretend to pass for literature. The [n]ation is inexorably sinking toward the lowest common denominator in its

> standards and values. Haven't we had enough?[59]

Those words spoken on the Senate Floor thirteen years ago ring even truer today as popular culture has continued to sink to an ever dropping lowest common denominator. Removing those restrictions that remain, such as the FCC's decency standards, would only speed up the decline.

Alexander Solzhenitsyn best summed up the reason for maintaining decency standards – to "defend against the abyss of human decadence."[60]

> The defense of individual rights has reached such extremes as to make society as a whole defenseless

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[59] Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 437 (2000) (citing 144 Cong. Rec. S10,110 (daily ed. Sept. 9, 1998) (statement of Sen. Byrd)).

[60] Alexander Solzhenitsyn, Address at Class Day Afternoon Exercises, Harvard University: A World Split Apart (June 8, 1978), *available at* http://www.columbia.edu/cu/augustine/arch/solzhenitsyn/harvard1978.html (last visited August 19, 2011).

> against certain individuals. It is time, in the West, to defend not so much human rights as human obligations.
>
> Destructive and irresponsible freedom has been granted boundless space. Society appears to have little defense against the abyss of human decadence, such as, for example, misuse of liberty for moral violence against young people, motion pictures full of pornography, crime and horror. It is considered to be part of freedom and theoretically counter-balanced by the young people's right not to look or not to accept. Life organized legalistically has thus shown its inability to defend itself against the corrosion of evil.[61]

Mr. Solzhenitzyn noted that the press, which includes television broadcasting, can both simulate public opinion and "miseducate it," claiming "everyone is entitled to know everything." "But this is a false slogan, characteristic of a false era: people also have the right not to know, and it is a much more valuable one. The right not to have their divine

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61 *Id.*

souls stuffed with gossip, nonsense, vain talk. A person who works and leads a meaningful life does not need this excessive burdening flow of information,"[62] particularly when the information consists of indecent language and images that contribute to anti-social, even harmful behavior. Children whose brains are still developing do not need the burden of fleeing expletives and obscene images becoming ingrained in their memories before they fully understand the world around them.

"Hastiness and superficiality are the psychic disease of the 20th century and more than anywhere else this disease is reflected in the press."[63] "The press has become the greatest power within the Western countries, more powerful than the legislature, the executive and the judiciary. One would then like to ask: by what law has it been elected and to whom is it responsible?"[64]The answer in this case is that the press, *i.e.* the broadcasters, as licensees granted permission to use the public airwaves, is accountable to the owners of the airwaves – the American people. Congress has appointed the FCC as the guardian of the public's interest. As such, the FCC has enacted

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62 *Id.*

63 *Id.*

64 *Id.*

decency standards that attempt to protect the public interest. Abandoning those standards would leave the broadcasters wholly unaccountable and would lead to use of the public airwaves in a manner that is detrimental to the public interest, not to mention the health, safety and welfare of the nation's children.

CONCLUSION

The FCC's minimal decency regulations are reasonable and necessary responses to the downward slide of popular culture. As guardians of the public airwaves, the FCC has properly exercised its role by restricting the broadcast of indecent language to hours when children are least likely to be exposed to it.

The state's compelling interest in protecting the physical and psychological well-being of children amply justifies the regulations and they should be upheld.

September 2011

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
1055 MAITLAND CTR
COMMONS, 2D FLOOR
MAITLAND, FL 32751
(800) 671-1776
Email: court@lc.org

Stephen M. Crampton
Mary E. McAlister
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
Email: court@lc.org

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE CATO INSTITUTE, CENTER FOR DEMOCRACY & TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE, AND TECHFREEDOM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

JOHN P. ELWOOD
Counsel of Record
ERIC A. WHITE
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

[Additional Counsel Listed On Inside Cover]

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Law

EMMA J. LLANSÓ
CENTER FOR DEMOCRACY & TECHNOLOGY
1634 I Street, NW, Suite 1100
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(202) 637-9800
ellanso@cdt.org

JOHN BERGMAYER
HAROLD FELD
PUBLIC KNOWLEDGE
1818 N Street, NW, Suite 410
Washington, DC 20036
(202) 861-0020
john@publicknowledge.org

THOMAS S. LEATHERBURY
VINSON & ELKINS LLP
Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, TX 75201
(214) 220-7700
tleatherbury@velaw.com

LEE TIEN
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9993
tien@eff.org

BERIN SZOKA
TECHFREEDOM
1899 L Street, NW, Suite 1260
Washington, DC 20036
(202) 455-8186
bszoka@techfreedom.org

QUESTION PRESENTED

Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

Question Presented I

Table of Authorities III

Interest of *Amici Curiae* 1

Summary of Argument 3

Argument 5

A. The Convergence Of Modern Communications Technologies Means That Broadcast Television Is No Longer A "Uniquely Pervasive" Medium 5

B. Consumers' Increasing Ability To Control The Content Available In Their Households Means Broadcasting Is No Longer An Invasive Harm To Children 11

C. Because Broadcasting Is No Longer Uniquely Pervasive Or Invasive, Broadcast Speech Merits The Same First Amendment Protections As Other Media 22

Conclusion 25

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae submit this brief in support of Respondents, urging the Court to affirm the judgment below that the FCC's regulatory framework for broadcast television content is unconstitutional. *Amici* are nonprofit public interest organizations that advocate for consumer and citizen interests on a wide range of issues. Although *amici* often appear on opposite sides of technology policy debates, they are united in their commitment to the First Amendment and its preference for technological empowerment over paternalistic censorship. *Amici* have a substantial interest in this case because the FCC's indecency-enforcement regime is fundamentally inconsistent with First Amendment rights and inserts the heavy hand of government into the individual choices of consumers and parents.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The Center for Democracy & Technology is a nonprofit public interest organization focused on privacy and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. The Center for Democracy & Technology represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The Electronic Frontier Foundation is a nonprofit member-supported organization based in San Francisco, California, that works to protect free speech and privacy rights in an age of increasingly sophisticated technology.

Public Knowledge is a nonprofit public interest organization devoted to protecting citizens' rights in the emerging digital culture. It is focused on the intersection of intellectual property, media, technology, and the law. Public Knowledge seeks to guard the rights of consumers, innovators, and creators at all layers of our culture through legislative, administrative, grassroots, and legal efforts, including regular participation in intellectual property, free speech, and telecommunications cases.

TechFreedom is a nonprofit, nonpartisan public policy think tank that works on a wide range of information technology policy issues, including free speech, child protection, and privacy. TechFreedom works to promote the progress of technology that improves the human condition and expands individual capacity to choose. TechFreedom

envisions a bright future where technology enhances freedom and freedom enhances technology.

SUMMARY OF ARGUMENT

In the modern media environment, the FCC no longer has the constitutional authority to regulate speech under a reduced standard of scrutiny based on *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), when the same speech, if communicated by any medium other than broadcast television, would receive full First Amendment protection. The Second Circuit recognized as much. See, *e.g.*, Pet. App. 15a-17a. Petitioners defend the FCC's actions based on *Pacifica*, though that case's factual underpinnings have withered in the 33 years since it was decided.

Pacifica is based on an archaic and unrealistic conception of broadcast television. The state of media and technology today directly challenges *Pacifica*'s assumption that broadcast television is a unique medium that deserves only watered-down First Amendment protection. The Second Circuit hit the nail on the head when it concluded that "we face a media landscape that would have been almost unrecognizable in 1978." Pet. App. 15a. In 1978, nearly all Americans relied on broadcasting to deliver a limited range of video media to their homes, and were largely powerless to control their children's access to that media. Technological advances over the last 33 years have brought new types of media into existence, combined elements of older media with new types of media in new delivery systems, and brought about a dramatic increase in the ability of consumers to control the content of media received in their homes.

Today's world of converged, customizable video media would have seemed like science fiction to the *Pacifica* court. But it is precisely the kind of world this Court contemplated in 2000 when it declared: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000).

It is well past time for the law to recognize how much the world has changed by ending the FCC's censorship of speech that is broadcast on television. The factual basis on which *Pacifica* rests no longer holds true. *Pacifica*'s "pervasiveness" doctrine and its consideration of broadcast television as an "intruder in the home" are relics of a bygone technological era and no longer justify affording regulation of such speech diminished scrutiny. Put simply, we no longer live in the world where *Pacifica* was decided.

In light of the dual developments of media platform convergence and consumer control, it is no longer appropriate to apply different legal standards to the same content based solely on the medium consumers use to access it. Broadcast media no longer has "unique" characteristics that justify affording diminished protection to speech that, in other contexts, would be fully protected under the First Amendment. Because over-the-air broadcasting is just one of countless ways Americans access content (including indecent content, if they choose), it no longer makes sense to accord broadcast speech any less First Amendment protection than other forms of media. Instead, speech that is broadcast should be extended the same full First Amendment protection

that this Court has afforded speech on the Internet. See *Reno* v. *ACLU*, 521 U.S. 844 (1997).

ARGUMENT

Pacifica accorded broadcast television limited First Amendment protection because of two characteristics the Court understood the medium to have at the time: first, broadcast television had a "uniquely pervasive presence in the lives of all Americans"; second, broadcast television intruded into the privacy of the home, where it could easily be accessed by children. *Pacifica*, 438 U.S. at 748-750. Today, broadcast television is no longer uniquely pervasive because technology has transformed how Americans receive information and entertainment; and it is no longer invasive because technology has empowered consumers to control the broadcasting content to which they and their children are exposed.

A. The Convergence Of Modern Communications Technologies Means That Broadcast Television Is No Longer A "Uniquely Pervasive" Medium

Pacifica largely rests on the finding that "broadcast media have established a uniquely pervasive presence in the lives of all Americans." 438 U.S. at 748. When *Pacifica* was decided in 1978 (and only a small percentage of households had cable television), there really were only two ways to deliver content to the public in their homes: broadcast (television and radio) and paper (newspapers, magazines, and the like). Cf. *id.* at 749 n.27. Over thirty years later, however, the proliferation of new media technologies has radically transformed, and continues to transform, how entertainment and news

content is delivered to the home. The characteristics of various media are converging; as they converge, the distinctions among various types of content and delivery methods are blurring.

The proliferation of satellite and cable television channels as well as Internet-based video outlets has eroded the "unique[ness]" of broadcast media. *Pacifica*, 438 U.S. at 748. The media environment has changed profoundly: Americans—adults and children alike—are increasingly accessing new video content through cable, telephone, and satellite operators such as Comcast's Xfinity, EchoStar's DISH Network, AT&T's UVerse, Verizon's FIOS, and DirecTV; over the Internet on popular websites such as YouTube, iTunes, and Hulu; via podcasts[2]; by online video streaming through services such as Netflix; and through DVD purchases and rentals.[3] All these media come into the home as invited guests, not as intruders.

These new technologies have largely displaced traditional broadcasting. Not only are more people accessing video content by means besides broadcast television, but broadcast content is increasingly available through these new media technologies. Individuals routinely access broadcast programming

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[2] A "podcast" is an audio or video file, usually in MP3 format, made for download to a portable player or personal computer. See Definition of "podcast," Urban Dictionary, http://www.urbandictionary.com/define.php?term=podcast.

[3] See, *e.g.*, Tom Rosenstiel et al., *How People Learn About Their Local Community*, Pew Internet & American Life Project (Sept. 26, 2011), available at http://pewinternet.org/~/media//Files/Reports/2011/Pew%20Knight%20Local%20News%20Report%20FINAL.pdf.

through cable and satellite services. And network programming is increasingly available on the Internet. For example, entire episodes of popular network shows such as *MasterChef* (Fox), *Parks and Recreation* (NBC), *Dancing with the Stars* (ABC), and *Survivor* (CBS) can be viewed on the networks' websites for free.[4] Indeed, broadcasters are now sometimes posting their content online *before* its release on broadcast platforms. As early as March 2005, NBC debuted its situation comedy *The Office* on the Internet a week before the show premiered on network television.[5] More recently, NBC launched a series of "webisodes" of the show—short vignettes featuring the show's characters—that are *only* available online.[6]

Network shows and other broadcast programming are also now available on a number of websites such as iTunes and YouTube. NBC, an intervenor in this case, helped to start its own popular website and subscription service, Hulu.com (described as "a hub for network TV shows and movies"[7]) and Hulu Plus

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[4] See FOX Broadcasting Company Full Episodes, http://www.fox.com/full-episodes/; NBC Video Library Full Episdoes, http://www.nbc.com/video/library/full-episodes/; ABC Full Episodes, http://abc.go.com/watch; CBS Video, http://www.cbs.com/video/.

[5] Anne Becker, *NBC's Office Gets Web Broadcast*, Broadcasting & Cable (Mar. 16, 2005), http://www.broadcastingcable.com/article/CA511340.html.

[6] NBC.com, The Office, http://www.nbc.com/The_Office/webisodes/.

[7] Jeremy Caplan et al., *Best Inventions of 2008*, Time Magazine, http://www.time.com/time/specials/packages/article/0,28804,1852747_1854195_1854116,00.html (ranking Hulu.com

("a sweeping vision of the future of online, on-demand television viewing").[8] Furthermore, many broadcast programs can be downloaded through video game consoles,[9] viewed as streaming content by using external devices such as Roku or Apple TV,[10] or accessed directly on new Internet-ready televisions.[11] And complete seasons of most broadcast shows are available for rental or purchase on DVD shortly after the TV season comes to a close.[12]

These new forms of media are rapidly gaining on traditional broadcast television. Well over three-quarters of all Americans use the Internet,[13] up from

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the fourth best invention of 2008 and opining, "When cable eventually dies, websites like Hulu will be held responsible.").

[8] Brian Stelter, *Hulu Unveils Subscription Service for $9.99 a Month*, N.Y. Times Media Decoder (June 29, 2010, 1:24 PM), http://mediadecoder.blogs.nytimes.com/2010/06/29/hulu-unveils-subscription-service-for-9-99-a-month/.

[9] Barbara Ortutay, *Microsoft Brings TV to Xbox 360*, USA Today (Oct. 5, 2011), http://www.usatoday.com/tech/news/story/2011-10-05/xbox-tv-on-demand/50670406/1.

[10] Marvin Ammori, *Copyright's Latest Communications Policy: Content Lock-Out and Compulsory Licensing for Internet Television*, 18 CommLaw Conspectus 375, 377, 391 (2010).

[11] See, *e.g.*, Nick Wingfield and Don Clark, *Internet-Ready TVs Usher Web Into Living Room*, Wall St. J. (Jan. 5, 2009), http:// online.wsj.com/article/SB123111603391052641.html.

[12] See, *e.g.*, Joe Flint, *'True Blood,' Anyone? That's the Question HBO Is Getting Ready to Ask As It Offers Repeats of Its Sexy, Violent Beast to Commercial Cable Networks*, San Jose Mercury News, at 3D (July 25, 2010) ("[M]ost TV shows are now released on DVD long before they're available in reruns * * * *"), available at 2010 WLNR 15029270.

[13] *Demographics of Internet Users*, Pew Internet & American Life Project Surveys (Apr. 26-May 22, 2011),

about half in 2000, and under a third in 1997.[14] "As of May 2011, six in ten * * * American adults have a high-speed broadband connection at home."[15] And nearly three quarters of adults on the web use video-sharing websites.[16] The FCC itself recognizes that "substantial numbers of households now subscribe to cable or satellite * * * (87%)." FCC Brief 44 (citing Pet. App. 15a). Netflix subscriptions, which provide subscribers "unlimited TV episodes and movies instantly over the Internet" through their computers or televisions, start at $7.99 per month.[17] Currently, there are over 20 million Netflix subscribers (most in the United States).[18] A basic Roku device, which allows access to Internet content on a television, is less than $60.[19] New DVD players are readily

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http://www.pewinternet.org/Static-Pages/Trend-Data/Whos-Online.aspx (finding that 78% of all Americans use the Internet).

[14] *Internet Adoption, 1995-2011*, Pew Internet & American Life Project Surveys (Mar. 2000-May 2011), http://www.pewinternet.org/Static-Pages/Trend-Data/Internet-Adoption.aspx.

[15] *Broadband and Dial-Up Adoption, 2000-2011*, Pew Internet & American Life Project Surveys (Mar. 2000-May 2011), http://www.pewinternet.org/Trend-Data/Home-Broadband-Adoption.aspx.

[16] Kathleen Moore, *71% of Online Adults Now Use Video-Sharing Sites*, Pew Internet & American Life Project 2 (July 25, 2011), http://www.pewinternet.org/~/media//Files/Reports/2011/Video%20sharing%202011.pdf.

[17] Netflix, http://www.netflix.com/HowItWorks (click "How Does Netflix Work?)

[18] Nextflix, http://ir.netflix.com.

[19] Roku, http://shop.roku.com/.

available for under $35,[20] and DVDs are widely rented at automated supermarket kiosks for as little as one dollar.[21] This stands in stark contrast to the state of technology during the decade when *Pacifica* was decided—when the Internet "as we understand it today was not widely available for consumer and commercial use,"[22] and primitive VCRs "cost an average of $1,955."[23] To say that times have changed since this Court found "broadcast media [to] have established a uniquely pervasive presence in the lives of all Americans" (*Pacifica*, 438 U.S. at 748) is a drastic understatement.

As the FCC and its *amici* note, a small proportion of households still rely on over-the-air broadcast signals for video programming. See, *e.g.*, FCC Br. 44-45; Parents Television Council Amicus Br. 7. But the number who do so exclusively has dwindled from almost the entire television-viewing public in 1978 to (at most) 15 percent of it,[25] and perhaps as low as eight percent,[26] as consumers increasingly access

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[20] Walmart, http://www.walmart.com/catalog/product.do?product_id=10771165&findingMethod=rr.

[21] Redbox, http://www.redbox.com/ (click "Find a Location").

[22] Jeffrey Stavroff, *Damages in Dissonance: The "Shocking" Penalty for Illegal Music File-Sharing*, 39 Cap. U.L. Rev. 659, 714 (Summer 2011).

[23] Julie Macedo, *Meet the Television of Tomorrow. Don't Expect to Own It Anytime Soon*, 6 UCLA Ent. L. Rev. 283, 308 n.140 (1999).

[25] Parents Television Council Amicus Br. 7.

[26] *Cord Cutting and TV Service: What's Really Going On?* Consumer Electronics Association, (May 2011), available at http://www.cesweb.org/shared_files/ECD-TOC/CEACordCuttingAnalysis.pdf

broadcast content using numerous non-broadcast platforms. Given the affordability of non-broadcast alternatives,[27] that a small percentage of households still chooses to rely exclusively on the traditional broadcast medium likely reflects consumer choice as much as lack of access to alternatives. In any event, eight and 15 percent are figures more often associated with the description "rare" than "pervasive."

B. Consumers' Increasing Ability To Control The Content Available In Their Households Means Broadcasting Is No Longer An Invasive Harm To Children

Not only are new technologies changing the way people watch programs, they are changing the way content is controlled by the consumer. Consumers now have unprecedented freedom of choice to avoid exposure to inappropriate content, and, thus, it is simply no longer true that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen" like an "intruder" in the home. *Pacifica*, 438 U.S. at 748. Today, unlike in 1978, viewers can effectively shield themselves and their children from content they deem undesirable using a wide variety of mechanisms.

One of the main factors *Pacifica* cited to justify regulation of broadcast television was the Court's

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[27] The average price of basic subscription video service was just $17.65 per month in 2009, with basic satellite service, which reaches remote areas, being slightly cheaper at $17.29. Federal Communications Commission, Report on Cable Industry Prices 8-9 (Feb. 14, 2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-284A1.pdf.

view that "broadcasting is [a medium] uniquely accessible to children." See 438 U.S. at 749. But today, children are leading the shift away from broadcast television to a variety of new (and largely unregulated) media outlets and technologies such as websites, blogs, social networking services, iPads, iPods, MP3 players, smart phones, other mobile devices, and cable and satellite networks.[28] It is no surprise that Internet access among the young exceeds that of older generations. Upward of 87% of U.S. children ages 12 to 17 use the Internet.[29] And when children watch broadcast content, they do so increasingly using non-broadcast platforms.[30]

In the Internet context, there is a large and ever-increasing number of tools available to parents to allow them to exercise control over what content their children access. The development and proliferation of parental control technology has flourished in the absence of government regulation of online content. Internet Service Providers such as Comcast, Verizon, and Charter provide an array of parental control

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[28] See Mary Madden, *Internet Penetration and Impact*, Pew Internet & American Life Project 3-4 (April 2006), available at http://www.pewinternet.org/~/media//Files/Reports/2006/PIP_Internet_Impact.pdf.pdf; Amanda Lenhart, Mary Madden, Paul Hitlin, Teens and Technology: *Youth Are Leading the Transition to a Fully Wired and Mobile Nation*, Pew Internet & American Life Project 1 (July 27, 2005), available at http://www.pewinternet.org/~/media/Files/Reports/2005/PIP_Teens_Tech_July2005web.pdf.pdf.

[29] Lenhart et al., *supra* note 28, at 2.

[30] *Id.* at 2-3.

features to their subscribers.[31] Numerous software filtering and other tools are available, often as free downloads, and websites such as www.GetNetWise.org provide information to help parents compare available tools.[32] Parental controls are also being bundled into the leading operating systems provided by Microsoft and Apple.[33] And falling computer storage costs means it is easier than ever to archive preferred media content on computer systems—and thus increasingly a personal computer can supplement or even replace a television.[34]

As for traditional television sets, even the most basic ones have built-in content controls to allow parents to regulate their children's exposure to inappropriate programming. The V-Chip has been installed in all television sets with screens 13 inches or larger made since 2000 and allows parents to block

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[31] Xfinity, http:// xfinity.comcast.net/constantguard/; Verizon, http://parentalcontrolcenter.com/; http://www.myaccount.charter.com/customers/support.aspx?supportarticleid=1678.

[32] Adam Thierer, *Parental Controls & Online Child Protection: A Survey of Tools and Methods* 113-143 (Summer 2009), available at http://www.pff.org/parentalcontrols/Parental%20Controls%20&%20Online%20Child%20Protection%20%5BVERSION%204.0%5D.pdf

[33] Microsoft Windows Security and Safety, http://windows.microsoft.com/en-US/windows-vista/products/features/security-safety; Apple OS X Security, http://www.apple.com/macosx/what-is/security.html.

[34] Melissa J. Perenson, *The Hard Drive Turns 50*, PCWorld (Sept. 13, 2006), http://www.pcworld.com/article/127104/the_hard_drive_turns_50.html.

broadcast content based on ratings.[35] The ratings use age-based designations[36] as well as several specific content descriptors (for coarse language, sex, and violence) to permit parents to tailor the programming to which their children will have access.[37] These ratings are displayed prominently at the beginning of

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[35] *Signal Bleed – How to Prevent Viewing of Scrambled Cable TV Programs*, Federal Communications Commission, http://www.fcc.gov/guides/signal-bleed-how-prevent-viewing-scrambled-cable-tv-programs.

[36] The ratings system offers the following age-based designations:

"TV-Y" — All Children

"TV-Y7" — Directed to Children Age 7 and Older

"TV-Y7-FV" — Directed to Older Children Due to Fantasy Violence

"TV-G" — General Audience

"TV-PG" — Parental Guidance Suggested

"TV-14" — Parents Strongly Cautioned

"TV-MA" — Mature Audience Only

The TV Parental Guidelines, http://www.tvguidelines.org/ratings.htm.

[37] The ratings system also uses the following content labels:

"D" — Suggestive Dialogue

"L" — Coarse or Crude Language

"S" — Sexual Situations

"V" — Violence

"FV" — Fantasy Violence

Ibid.

programs, in onscreen menus and interactive guides, and in local newspaper listings.[38]

Another critical development has been the rapid rise of technologies such as DVD players, digital video recorders ("DVRs"), and video on demand ("VOD") services. These technologies give parents the ability to accumulate libraries of preferred (or even pre-screened) programming for their children and determine exactly when that programming will be viewed. Using these tools, households can tailor programming to their specific needs and values. These new technologies are so effective in providing parents control that one of petitioner's *amici* proudly—and, in light of its position before this Court, ironically—tells its members to "[g]o ahead, give your kids the remote," because with these technologies, "you'll never have to worry again about what your children are watching on TV."[39]

Ownership of such content controls is rapidly increasing as their costs plummet. In just seven

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[38] Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 CommLaw Conspectus 431, 472 (2007).

[39] Parents Television Council Online Store, http://www.parentstv.org/store/default.asp. *Amicus* the Parents Television Council ("PTC") also features the message that, "[w]ith TiVo KidZone, PTC-recommended programming is always at your fingertips." *Ibid.* The PTC also touts other user empowerment tools, too—such as SkyAngel, Clear Play, and Power Cop. The strong endorsement of these technologies on the PTC's website stands in jarring contrast to that group's assertion in its brief that "[t]he technology available to viewers is not an effective bulwark against indecent broadcasting." See Parents Television Council Amicus Br. 14.

years, the percentage of households with a DVD player climbed from 13% in 2000 to 83% in 2007.[40] DVRs and VOD are experiencing similarly rapid growth as the price of units has fallen from more than $1,000 only a few years ago to less than $100 today.[41] It is estimated that two out of five U.S. households had a DVR last year,[42] up from one in every five households in 2007 and one in every 13 households in 2005.[43] And for the 86% of U.S. households subscribing to cable or satellite television services (Pet. App. 15a), the cost is even lower, as most video service providers now offer DVR functionality bundled into their cable and satellite set-top boxes. Meanwhile, "nearly 90% of U.S. digital cable subscribers had access to VOD, and 46% of all basic cable customers were offered the service" as of March 2007.[44] Some forecasts estimate that each

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[40] *U.S. Consumer Sales and Forecasts, 2003-2008*, Consumer Electronics Association (July 2007).

[41] Compare Comments of the Progress & Freedom Foundation and the Electronic Frontier Foundation before the Federal Communications Commission, No. 09-194, 40 (Feb. 24, 2010), available at http://ecfsdocs.fcc.gov/filings/2010/02/24/6015538029.html, with Tivo Product Information, http://www.tivo.com/products/home/index.html.

[42] *DVRs Now In 40% of U.S. TV Households*, Leichtman Research Group (Sept. 27, 2010), http://www.leichtmanresearch.com/press/092710release.html.

[43] *DVRs Now In Over One of Every Five U.S. Households*, Leichtman Research Group (Aug. 21, 2007), http://www.leichtmanresearch.com/press/082107release.html.

[44] Adam Thierer, *Parental Control Perfection? The Impact of the DVR and the VOD Boom on the Debate over TV Content Regulation*, Progress & Freedom Foundation, Progress on Point (Oct. 11, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029764 (internal citations omitted).

home will be watching nearly two hours of on-demand content nightly by the end of 2012.[45] These technologies—unimaginable in 1978—are already well within reach of most Americans.

A variety of other technologies empower parents to control their children's viewing of content historically delivered by broadcast to televisions whose only parental controls were the on/off switch and the power cord. The vast majority of the television-viewing public who are cable and satellite subscribers (Pet. App. 15a) have even more options to filter or block unwanted broadcast programming: set-top boxes offer locking functions for individual channels, preventing children from accessing those channels or programs without a password,[46] and parental controls are also usually intuitive and readily accessible.[47] For example, DirecTV has the "Locks & Limits feature built into [its] equipment," which allows parents to "block specific movies based

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[45] Scott Sleek, *Video on Demand Usage: Projections and Implications*, Pike & Fischer (Oct. 2007), available at http://www.roadbandadvisoryservices.com/researchReportsBriefsInd.asp?repId=541.

[46] A comprehensive survey of the content controls that cable television providers make available to their subscribers can be found on the "Control Your TV" website of the National Cable and Telecommunications Association. See Control Your TV, http://controlyourtv.org/Intro.aspx.

[47] A new industry sponsored campaign entitled "The TV Boss," http://www.thetvboss.org/, offers easy-to-understand tutorials explaining how to program the V-Chip or cable and satellite set top box controls. As part of the effort, several public service announcements and other advertisements have aired or been published reminding parents that these capabilities are at their disposal.

on their MPAA rating, lock out entire channels, [and] set limited viewing hours."[48] Just as with the V-Chip, parents can access the restricted content—whether for their own enjoyment or to pre-screen it for their children—by entering a personal identification number.[49] In addition, specialized remote controls can also limit children to channels approved by their parents.[50] And independent screening tools such as TVGuardian offer features like a "Foul Language Filter" that can filter out profanity (even from broadcast signals) based on closed captioning.[51] It was these types of user controls that led the Court to find "a key difference between cable television and the broadcasting media," and to apply strict scrutiny to regulation of cable TV content. *Playboy*, 529 U.S. at 815.

Even as these parental empowerment technologies improve and proliferate, an increasing number of households are simply taking a more active role in setting and enforcing rules for what their children watch.[52] A 2003 Kaiser Family Foundation survey

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[48] Thomas W. Hazlett, *Shedding Tiers for a la Carte? An Economic Analysis of Cable TV Pricing*, 5 J. on Telecomm. & High Tech. L. 253, 266 n.39 (Fall 2006) (citation omitted).

[49] *Ibid.*

[50] See Weemote, http://weemote.com/.

[51] See TVGuardian Foul Language Filter, http://tvguardian.com/.

[52] See, *e.g.*, *ACLU* v. *Mukasey*, 534 F.3d 181, 203 (3d Cir. 2008) ("Though we recognize that some * * * parents may be indifferent to what their children see, others may have decided to use other methods to protect their children—such as by placing the family computer in the living room, instead of their children's bedroom * * * ."); *ibid.* ("Studies have shown that the

found that "[a]lmost all" parents have set "rules about their children's use of media."[53] That is particularly true of parents with young and impressionable children.[54] A similar percentage of parents had similar rules for video game and computer usage.[55] As the Census Bureau found, "[p]arents are taking a more active role in the lives of their children than they did 10 years ago," particularly with regard to rules respecting what their children watch.[56] Rather than modern media being like an unwanted "intruder in the home," *Pacifica*, 438 U.S. at 748, technology has increasingly

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primary reason that parents do not use filters is that they think they are unnecessary because they trust their children and do not see a need to block content.").

[53] *Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers*, Kaiser Family Foundation, 9 (Oct. 28, 2003), http ://www.kff.org/entmedia/3378.cfm.

[54] *The Media Family: Electronic Media in the Lives of Infants, Toddlers, Preschoolers and Their Parents*, Kaiser Family Foundation, 20 (May 24, 2006), http://www.kff.org/entmedia/7500.cfm.

[55] *Ibid.*

[56] The Census Bureau report measured how many families imposed three specific types of household media rules: restrictions on the type of programming allowed, the number of hours watched, and time and day viewing was allowed. It found the percentage of families imposing all three types of rules rose from 1994 to 2004 for the three different age groups surveyed: enforcement in families with children 3 to 5 years of age rose from 54% to 64.7%, 6 to 11 years of age rose from 60.3% to 70.5%, and 12 to 17 years of age rose from 40.2% to 46.7%. Jason Fields et al., *A Child's Day: Home, School, and Play (Selected Indicators of Child Well-Being)*, U.S. Census Bureau Household Economic Studies 17 (Feb. 2001), available at http://www.census.gov/prod/2001pubs/p70-68.pdf.

empowered modern families to allow only invited guests.

The FCC and its *amici* contend that this array of technological developments is not enough to stem the concerns raised in *Pacifica*. The FCC focuses its attention almost exclusively on the V-Chip rather than the many other devices available to parents at low cost, see FCC Br. 49-52, claiming that the V-Chip is ineffective in essence because not enough parents use it or know how to use it. See *id.* at 51. Meanwhile, the FCC's *amicus*, the PTC, *seems* to suggest that even the most foolproof technological development could not undercut the FCC's regulatory authority because "it is respondents, not their audience, who are obliged to take steps to avoid broadcasts of indecent material." Parent Television Council Amicus Br. 5.

Those arguments do not pass muster. As a factual matter, the FCC's focus on the percentage of parents who use the V-Chip ignores the fact that many parents have children who are either too young or too old for use of the V-Chip to be necessary, while others prefer to use other tools and methods to control their children's media consumption.[57] Regardless, the constitutional significance of user empowerment technologies as less restrictive alternatives to government speech controls is not diminished because parents must take steps to use them, some

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[57] Adam Thierer, *Who Needs Parental Controls? Assessing the Relevant Market for Parental Control Technologies*, The Progress & Freedom Foundation (February 2009), available at http://www.pff.org/issues-pubs/pops/2009/pop16.5parentalcontrolsmarket.pdf.

parents choose not to, or they do not always function perfectly.

If parents choose not to use the many available tools for controlling media in their house, the FCC cannot constitutionally claim that this gives the government the right to act *in loco parentis*. That conclusion follows from this Court's holding that governmental action to promote parents' voluntary efforts to protect their children from sexual content is a less restrictive alternative to statutorily mandated blocking. See, *e.g.*, *Playboy*, 529 U.S. at 827. In *Playboy*, the Court found a statute requiring cable companies to scramble sexually explicit programming unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests by parents. *Id.* at 822. As the Court observed, "targeted blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815. In language directly relevant here, the Court continued:

> It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

Id. at 824.[58] Consequently, the FCC's insistence on perfect, effortless, and universally used tools is misplaced. And the PTC is simply wrong that "[t]hose who contend that viewers who want to avoid indecent broadcasting should use a technology filter have it backwards." Parents Television Council Amicus Br. 12. This Court has never suggested that it is appropriate to restrict protected expression simply to spare those who disapprove of the message the minor inconvenience of avoiding it.

C. Because Broadcasting Is No Longer Uniquely Pervasive Or Intrusive, Broadcast Speech Merits The Same First Amendment Protections As Other Media

As the Second Circuit recognized below, the Court has consistently applied strict scrutiny to indecency regulations outside the broadcasting context. Pet. App. 13a-14a. The First Amendment generally prohibits the regulation of speech based on content, and even "indecent" speech has inherent First Amendment protection. See *id.* at 13a; see also *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). But in *Pacifica*, this Court appeared to apply a lower level of scrutiny, stating that, "of all forms of

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[58] Following this Court's reasoning in *Playboy*, the Third Circuit overturned another content regulation statute—the Child Online Protection Act ("COPA")—and held that Internet content filters are both more effective and less restrictive than COPA. *ACLU*, 534 F.3d at 202-203. The appeals court emphasized that "filters are more flexible than COPA because parents can tailor them to their own values and needs and to the age and maturity of their children and thus use an appropriate flexible approach differing from COPA's 'one size fits all' approach." *Id.* at 203.

communication, it is broadcasting that has received the most limited First Amendment protection," and thereby concluding that the FCC may lawfully censor broadcast content that is indecent but not obscene. *Pacifica*, 438 U.S. at 748.

The *Pacifica* Court concluded that broadcasting deserved only limited First Amendment protection because it was a "pervasive" and uncontrollable medium that intruded into the privacy of the home, and therefore easily accessible by children. *Id.* at 748-750; see also *Reno*, 521 U.S. at 869 (concluding that the Internet is not "invasive," contrasting *Pacifica*). And *perhaps* it was in 1978.

But, as described above, three decades later, technological advances have undermined the two factual predicates of the FCC's legal authority to regulate broadcast indecency. The convergence of broadcast and other forms of media undercuts the uniqueness of broadcast television as an "intruder" in the home, and the emergence of parental control tools for both broadcast and new media has undermined the legal underpinnings of the FCC's authority to regulate broadcast content. These developments have undermined the sole justification for relegating broadcast speech to an inferior category deserving something less than ordinary First Amendment protection. Like the Internet and other means of mass communication, broadcast television "is entitled to the highest protection from governmental intrusion" absent some supportable factual "basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno*, 521 U.S. at 863, 870 (analyzing the state of technology in

deciding what level of scrutiny to apply to the Internet).[59]

Under strict scrutiny, the FCC's regulatory regime cannot pass constitutional muster: No matter how compelling the government's interest in child protection or how narrowly tailored the FCC's censorship, governmental speech controls must yield to widely available parental controls as less restrictive means to achieve that goal. *Sable*, 492 U.S. at 126 ("[The government may only] regulate the content of constitutionally protected speech [e.g., indecency] in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."). Thus, this Court has applied strict scrutiny to restrictions on both cable TV and the Internet and squarely endorsed the use of technological controls as a less restrictive means to further a legitimate governmental objective. See *Reno*, 521 U.S. at 877 (noting the significance of "user based" alternatives to governmental regulation of speech on the Internet); *Playboy*, 529 U.S. at 814-815 (noting the same for cable television); accord *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (holding that California's regulation of violent video games fails strict scrutiny because of parental

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[59] Indeed, even in broadcasting, all other content based restricions on speech have been examined under strict scrutiny. See, *e.g.*, *FCC* v. *League of Women Voters of Cal.*, 486 U.S. 364, 376-378 (1984) (holding content-based broadcasting regulations subject to strict scrutiny); see also *Playboy*, 529 U.S. at 815 (noting that, although cable regulation is generally examined under intermediate scrutiny, strict scrutiny applies to content based regulation of indecent cable programming) (discussing *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 189-190 (1997)).

controls for video games). The same conclusion is warranted here.

CONCLUSION

Whatever "legal logic and common sense" (Nat'l Religious Broadcasters Amicus Br. 5) *Pacifica* might once have had was built on factual foundations that have long since collapsed. Traditional broadcasting has been largely replaced by other video delivery media that are *invited* into the home. The broadcast content censored by the FCC is just one of many kinds of video content available to consumers over a growing array of converged media. At the same time, technology has empowered Americans to control the programming that they and their children are exposed to. This is the digital "revolution" this Court celebrated for "expand[ing] the capacity to choose." *Playboy*, 529 U.S. at 818. There is no room in this world for *Pacifica*'s watered-down protections. Content broadcast over television deserves the same full constitutional protection afforded to Internet content in *Reno* v. *ACLU*. Consequently, the judgment of the Second Circuit should be affirmed.

Respectfully submitted.

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

JOHN P. ELWOOD
Counsel of Record
ERIC A. WHITE
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

EMMA J. LLANSÓ
CENTER FOR DEMOCRACY & TECHNOLOGY
1634 I Street, NW, Suite 1100
Washington, DC 20006
(202) 637-9800
ellanso@cdt.org

JOHN BERGMAYER
HAROLD FELD
PUBLIC KNOWLEDGE
1818 N Street, NW, Suite 410
Washington, DC 20036
(202) 861-0020
john@publicknowledge.org

THOMAS S. LEATHERBURY
VINSON & ELKINS LLP
Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, TX 75201
(214) 220-7700
tleatherbury@velaw.com

LEE TIEN
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9993
tien@eff.org

BERIN SZOKA
TECHFREEDOM
1899 L Street, NW, Suite 1260
Washington, DC 20036
(202) 455-8186
bszoka@techfreedom.org

Counsel for Amici Curiae

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
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Case No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS,
v.
FOX TELEVISION STATIONS, INC., ABC INC., ET AL.,
RESPONDENTS

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Amicus Brief of Decency Enforcement Center for Television Supporting Petitioners

THOMAS B. NORTH
Counsel of Record
1387 N. State St., #11
St. Ignace, MI 49781
(906) 643-6348

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18

LIMITED QUESTION PRESENTED

The Supreme Court has limited certiorari to the question of:

Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

Respondents who were petitioners in the court of appeals below are Fox Television Stations, Inc.; ABC Inc.; CBS Broadcasting, Inc.; WLS Television, Inc.; KTRK Television, Inc.; KMBC Hearst-Argyle Television, Inc.; Citadel Communications, L.L.C.; WKRN, G.P.; Young Broadcasting of Green Bay, Inc.; WKOW Television, Inc.; WSIL-TV, Inc.; ABC Television Affiliates Association; Cedar Rapids Television Company; Centex Television Limited Partnership; Channel 12 of Beaumont Incorporated; Duhamel Broadcasting Enterprises; Gray Television License, Incorporated; KATC Communications, Incorporated; KATC LLC; KDNL Licensee LLC, KETV Hearst-Argyle Television Incorporated; KLTV/KTRE License Subsidiary LLC; KSTP-TV LLC; KSWO Television Company Incorporated; KTBS Incorporated; KTUL LLC; KVUE Television Incorporated; McGraw-Hill Broadcasting Company Incorporated; Media General Communications Holdings LLC; Mission Broadcasting Incorporated; Mississippi Broadcasting Partners; New York Times Management Services; Nexstar Broadcasting

Incorporated; NPG of Texas, L.P.; Ohio/Oklahoma Hearst-Argyle Television Inc.; Piedmont Television of Huntsville Licensee LLC; Piedmont Television of Springfield License LLC; Pollack/Belz Communications Company, Inc.; Post-Newsweek Stations San Antonio Inc.; Scripps Howard Broadcasting Co.; Southern Broadcasting Inc.; Tennessee Broadcasting Partners; Tribune Television New Orleans Inc.; WAPT Hearst-Argyle Television Inc.; WDIO-TV LLC; WEAR Licensee LLC; WFAA-TV Inc.; and WISN Hearst-Argyle Television Inc.

Respondents who were intervenors in the court of appeals below are NBC Universal, Inc.; NBC Telemundo License Co.; NBC Television Affiliates; FBC Television Affiliates Association; CBS Television Affiliates; Center for Creative Community, Inc., doing business as Center for Creative Voices in Media; and Future of Music Coalition.

CORPORATE DISCLOSURE STATEMENT

Decency Enforcement Center for Television, a Michigan non-profit, IRC 501 (c) (3) tax exempt, corporation has no parent company, and no publicly held company owns 10% or more of its stock. (Decency Enforcement Center for Television is incorporated on a non-stock basis).

TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae	1
Summary of Argument	4
Arguments	8
I.The underlying legislative and judicial authority for the "Federal Communications Commission's current indecency-enforcement regime" is outside the scope of the Question Presented and limit of certiorari, and should not be reviewed..	8
II.The Federal Communications Commission's current indecency-enforcement regime does not violate the First Amendment..	13
III.No Respondent has raised in the lower court any constitutional challenge to the direct regulation of broadcast indecency or the underlying authority for the FCC regime..	16

IV. This Court should apply, and not disturb, its *Pacifica* precedent, due to both stare decisis and unchanged factual basis; in the alternative, if *Pacifica* were overturned, 18 U.S.C. 1464's broadcast indecency ban is constitutional on a "24/7" basis.. 19

A. This Court should follow its *Pacifica* precedent.. 20

B. In this Court's first decision in this case, then-Justice Stevens favored the "continued wisdom of *Pacifica*", and disagreed with Justice Thomas' concurrence, which had a flawed legal and factual basis.. 28

C. In the alternative, if this Court were to overturn *Pacifica*, 18 U.S.C. 1464's indecency prohibition is constitutional 24 hours a day.. 32

V. *Pacifica* foreclosed technology as any substitute for direct regulation of broadcast indecency, and the "V-chip" has no legal significance, especially since Respondents actively circumvent its technical ability to block their programs.. 34

A. This Court in *Pacifica* rejected technology as any substitute for direct regulation of broadcast indecency.. 34

B. The V-chip has no legal significance.. 35

C. Respondents prevent the V-chip from blocking programming by mis-rating most shows, and the V-chip is ineffective.. 37

VI. There is no basis upon which to apply strict scrutiny to broadcast restrictions.. 44

VII. No Respondent has ever challenged the constitutionality of 18 U.S.C. 1464, and its indecency restrictions are permanently constitutional.. 46

VIII. Even the Supreme Court lacks power to find unconstitutional all "direct regulation of broadcast indecency or content", or prevent Congress from new attempts to directly regulate broadcasting.. 48

Conclusion 50

TABLE OF AUTHORITIES

Cases: Page

Action for Childrens' Television v. F.C.C., 852 F.2d 1332.....15

Adickes v. Kress, 398 U.S. 144.....10

Ashcroft v A.C.L.U., 542 U.S. 656.....37,38,44,45

Ashwander v. Tennessee Valley Authority, 297 U.S. 288.....20

Beck v. Washington, 369 U.S. 541.....9,18

California v. Taylor, 353 U.S. 553.....10

Duckworth v. Eagan, 492 U.S. 195.....9

F.C.C. v. Pacifica Foundation, 438 U.S. 726.....4-6,9,11,15,16,19-24,26-36,44,50

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175.....9

Irvine v. California, 347 U.S. 128.....12

Kremens v. Bartley, 431 U.S. 119.....20

Paris Adult Theater I v. Slaton, 413 U.S. 59-60

.....47

Red Lion Broadcasting Co. v. F.C.C.,

395 U.S. 367.....16,21,22,29,47

Reno v. A.C.L.U., 521 U.S. 844

.....21,37,38,44,45,49,51

Sable Communications v. F.C.C., 492 U.S. 115

.....37,38,40,41,44,45

Steel Co. v. Citizens for a Better Environment,

523 U.S 83.....15

Turner v. Rogers, 131 S. Ct. 2507.....33

Tyrel v. District of Columbia, 243 U.S. 1.....10

U.S. v. Butler, 297 U.S. 1.....12

U.S. v. Playboy Entertainment Group, 529 U.S.

803.....37,38,40,41,44,45

Yeager v. U.S., 129 S. Ct. 2360.....17,18,46

Yee v. Escondido, 503 U.S. 519.....9

Constitution and statutes:

U.S. Constitution, First Amendment.....20,31,33

Radio Communications Act.....2,46

18 U.S.C. 1464.....2,4,6,7,12,18,21,31-33,37,46,47

U.S. Supreme Court Rules:

Rule 14.....4,8,9,18

Rule 24.....9,12,19

Rule 37.....1,2

Other:

Funai Corp., Notice of Apparent Liability

For Forfeiture, 22 FCC Recd. 19663.....38

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Decency Enforcement Center for Television (hereafter "Decent TV") files this brief supporting petitioners. Decent TV was incorporated for the express purpose of legally defending human and civil rights secured by decency laws, especially those for broadcast television. Decent TV speaks for, and advocates from the perspective of 1) the over 30 million Americans who have one or more televisions, but do not have cable/satellite service, or any effective content "blocking technology", 2) those millions of Americans who, even after the "digital conversion", still do not have a "V-chip", the technology in some larger televisions and some digital conversion boxes, and 3) those who have a V-chip, but the operation of which is circumvented by the broadcast networks' false ratings and failure to assign ratings, upon which the V-chip programming entirely relies.

Decent TV therefore advocates for the tens of millions of Americans who rely solely on the laws

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[1] No counsel for any party authored this brief in whole or part, nor did counsel for any party make any monetary contribution intended to fund the preparation or submission of this brief. U.S. Supreme Court Rule 37.6. Written consent was filed and served by principal Respondents Fox, ABC, CBS, NBC, and ABC Affiliates, and filed by Petitioner.

and rules of the United States government, including the Federal Communications Commission, to protect themselves from indecency in the sanctity of their own homes. Decent TV is further representative of ALL Americans in the sense that 1) they must rely on those federal laws to protect themselves and their families from broadcast television indecency in the many everyday public places in which broadcast television is present, but where citizens cannot program a "V-chip", and 2) citizens are constantly within range of one or more broadcast radio stations, for which there is no "V-chip" or other blocking technology in existence. Decent TV advocates against finding that the Radio Communications Act, 18 U.S.C. 1464 is unconstitutional.

American citizens cannot be expected to rely on the principal parties to make all necessary arguments, especially with word limitations. Decent TV filed an amicus brief in this Court in the first round in this case (in 2008), and its arguments were consistent with the eventual court decision. Decent TV filed amicus briefs in the Second Circuit in these (now consolidated) cases, as well as other federal court cases. There is a critical right of American citizens to fully protect their own

interests by participating in the process of the courts, to ensure that their necessary arguments are advanced for consideration, as recognized in U.S. Supreme Court Rule 37.

SUMMARY OF ARGUMENT

The Supreme Court has granted certiorari "limited to" the Question Presented, as to Federal Communications Commission's (hereafter, "FCC's") "current indecency-enforcement regime", defined by Respondents as 2001 "Industry Guidance" policy, and 2004 update.

That limit precludes review of broadcast indecency law from legislative or judicial branches - whether *Pacifica*, other case law, level of scrutiny, or 18 U.S.C. 1464. The 2nd Circuit only addressed vagueness of FCC policies. No party has presented any pleading or brief - in any court - requesting review of anything other than executive branch policy or level of scrutiny for policy.

The limited certiorari also prevents the Court from receiving briefs or arguments for fair review of underlying authority for policy.

FCC's "current indecency-enforcement regime" is not unconstitutionally vague. This Court should reverse the 2nd Circuit. But, if it affirms the 2nd Circuit, that includes remand to the FCC. This Court under its Rule 14.1(a) should not consider constitutional issues other than the vagueness of policy. But if it does, policy does not otherwise violate the First Amendment.

The 2nd Circuit erred by finding FCC's 2004 *Golden Globe* policy vague, because it post-dated and was not applied to the subject broadcasts.

The 2001 Industry Guidance was consistent with *Pacifica* when the subject TV programs were aired, the relevant time frame for review, and does not violate the First Amendment.

This Court should follow *Pacifica* due to stare decisis. Broadcasting remains uniquely pervasive, regardless of other media, because, as defined in *Pacifica*, it is still the ONLY medium that pervades the lives of ALL (100%) of Americans, and confronts them all in public and privacy of home. Viewers' First Amendment rights outweigh those of broadcasters. Broadcasting alone uses public airwaves, which are a public place, unlike private media subscribed to only by consenting adults. These foundational factual findings from *Pacifica* are not challenged, are permanent, and are unchangeable.

Pacifica rejected technology as any substitute for direct regulation of broadcast indecency, by ruling that the on/off button and prior warnings do not prevent a "first blow" of indecency, or protect listeners' constitutional rights.

The "V-chip" for broadcast TV has no legal

significance. Respondents promised the public and Congress to never use the V-chip for any court challenge to FCC regulation, and must be held to that. Unlike Supreme Court cases as to other media and blocking technologies, this is not a case of first impression, and there is a long history of statutory regulation found to be constitutional.

V-chips do not exist in TV's with under 13 inch screen size, or many larger televisions or digital converter boxes. Respondents circumvent the V-chip by failing to rate many programs, and mis-rating the rest at least 68% of the time, in order to not lose advertising revenue. The V-chip is ineffective, and Respondents have not presented any evidence to support their arguments, tacitly admitting their error rate. The two subject Fox programs prove that even a properly programmed V-chip does not work to block adult material, proving Petitioners' findings regarding these shows.

Supreme Court cases as to other blocking technologies are distinguished for many reasons. There is no basis for applying strict scrutiny to broadcasting.

In the alternative, if the Court were to overturn *Pacifica*, 18 U.S.C 1464 is constitutional on a "24/7" basis.

No Respondent has challenged 18 U.S.C. 1464's broadcast indecency ban, and the same is permanently constitutional.

Even the Supreme Court lacks power to find unconstitutional 1) all "direct regulation of broadcast indecency", as opposed to a specific statute, 2) all "direct regulation of broadcast content", which includes obscenity, which has no constitutional protection, or 3)any future attempts of Congress to directly regulate broadcasting through new legislation. Deregulation of broadcast content by judicial fiat would constitute handing de facto ownership of the public airwaves over to broadcasters without compensation.

ARGUMENTS

I.THE UNDERLYING LEGISLATIVE AND JUDICIAL AUTHORITY FOR THE "FEDERAL COMMUNICATIONS COMMISSION'S CURRENT INDECENCY-ENFORCEMENT REGIME" IS OUTSIDE THE SCOPE OF THE QUESTION PRESENTED AND LIMIT OF CERTIORARI, AND SHOULD NOT REVIEWED.

The Supreme Court granted certiorari "limited to" the Question Presented. The Question Presented by FCC's petition, under this Court's Rule 14.1(a), was tailored to the 2nd Circuit's rulings in two cases, consolidated here. Respondent ABC TV violated that rule by presenting its own question without filing an objection. The Court adopted ABC's question, but also limited certiorari.

The subject of the Question Presented is clear:

> 1)"indecency-enforcement" regime, e.g., the regime enforcing indecency law (rather than law itself), 2) specifically, "current" regime, and 3) that of the "Federal Communications Commission." The Question Presented is prefaced with "the Federal Communications Commission's", in the possessive.

The phrase "Federal Communications Commission's current indecency-enforcement

regime" has consistently been defined by Respondents in their briefs as the FCC's 2001 "Industry Guidance", and 2004 *"Golden Globe Order"*.

The limit of certiorari to the "current indecency-enforcement regime" of FCC, an executive branch agency, precludes review of underlying authority for that policy from the separate legislative or judicial branches - whether *FCC v Pacifica Foundation, 438 U.S. 726,* other case law (including that as to level of scrutiny), federal statute, or general direct regulation of broadcast indecency or content. This Court's Rule 14.1(a) states, "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." The Supreme Court will generally limit its consideration of the case "to the questions specifically brought forward by the petition." *Yee v. Escondido, 503 U.S. 519; Duckworth v. Eagan, 492 U.S. 195; General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175.* Where the Court, in granting certiorari, has limited the question to be considered, matters not within the scope of that question cannot thereafter be presented - and further, such limitations are specific. *Beck v. Washington, 369 U.S. 541.* (Exceptions are: the Court may consider plain error not included in the Question Presented (Rule 24.1)

and jurisdictional issues).

In addition, in order to be considered by this Court, those questions must properly arise in the record, *Tyrel v. District of Columbia, 243 U.S.* 1, and must have been urged and briefed below, *California v. Taylor, 353 U.S. 553.* This Court has declared it "will not ordinarily consider" issues not considered by the court below. *Adickes v. Kress & Co., 398 U.S. 144.* The 2nd Circuit expressly did not consider any constitutional issue other than "vagueness" of current FCC policies. No party has filed any petition or reply brief requesting that anything other than FCC executive policy/regime be reviewed.

Respondents must be held to their own briefs, pleadings, definitions, and admissions which reveal their constitutional challenges have consistently been directed to changes in FCC indecency policy, but not to underlying authority for FCC policy.

The case precedents Respondents cite, that a prevailing party may urge any grounds in support of a judgment in their favor, are trumped by this Court limiting certiorari to the Question Presented.

The Question Presented does not mention or encompass any **court's** or **Congress'** broadcast indecency regime, which are **not** FCC's regime, nor

therefore within the scope of the Question Presented.

The limit on certiorari prevents the Court from receiving adequate briefs or arguments upon which to base any decision outside the scope of the question as to FCC policy, and any such Court review would be unfair to the parties.

The most important words in this case are: "limited to." Primary Respondents have stated their intent to now argue for reconsideration of *Pacifica, supra*, and constitutionality of "direct regulation of broadcast content" (see pp.26-27 of Fox Reply Brief; p.29 of ABC's). That is extremely troubling, because no Respondent has ever challenged the direct regulation of ALL broadcast content, to include even obscenity.

Is Fox now going to, for the first time, challenge the ban on broadcast obscenity, without any pleadings, evidence, or record in the lower court, and in an indecency case at that? (FCC has not found any subject broadcast to be obscene). The statutory ban on obscenity IS direct regulation of broadcast content, but not at issue in this case, and not relevant. Fox may make a Trojan Horse argument, asking the Court to rule direct regulation of broadcast "content" unconstitutional, and thereby unintentionally also approve future obscenity.

Respondents' intended arguments are beyond the limit on certiorari and the scope of the Question Presented as to FCC's regime. Rule 24.1 prohibits Respondents from adding in their briefs questions not included in the Question Presented.

The Supreme Court disapproves of "the practice of smuggling additional questions into a case" after it grants certiorari. *Irvine v. California, 347 U.S. 128.* If Respondents were allowed to argue that 18 U.S.C. 1464 is unconstitutional, it would beg the question of: just what was the limit on certiorari, if the result could be unlimited judicial power?

It is most critical the Court restrain itself to the specific Question Presented as to FCC regime, and NOT underlying authority - as it restrained itself to administrative law the first time this case was decided.

"The only check upon our own exercise of power is in our own sense of self-restraint." *U.S. v. Butler, 297 U.S. 1 (Justice Stone's dissenting opinion).*

II. THE FEDERAL COMMUNICATIONS COMMISSION'S CURRENT INDECENCY-ENFORCEMENT REGIME DOES NOT VIOLATE THE FIRST AMENDMENT.

Respondents' definition of "FCC's current indecency-enforcement regime" as FCC policy is contained in their briefs. As examples, see Fox's Reply Brief in Opposition (to petition), p.27, referring to alleged "chill" from "new policy" discussed on p. 17, and FCC's 2001 "*Industry Guidance*", updated by 2004 "*Golden Globe Order*"; also Intervenor CBS's Supplemental Brief, p.1, in the 2nd Circuit ABC case. Full policy titles are: *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency (2001)* and *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Award" Program (2004).*

The 2nd Circuit, in Fox, found FCC's current policies unconstitutionally vague in determining which words are indecent, noting inconsistencies in FCC determinations. Then it applied that decision in ABC (without deciding in either case whether the programs were indecent).

The 2nd Circuit erred by finding policy vague as applied NOT to the subject TV programs or

language in them, but two FCC *Omnibus Orders* regarding OTHER programs. *Omnibus Orders* are not policy. It was error to find "vagueness" based on TV programs and language in *Omnibus Orders* not appealed to court. And, the *Omnibus Orders* appear to have been issued AFTER the subject TV programs, were not relevant to then-policy, nor could Fox have relied upon them.

This Court may apply the 2001 Industry Guidance to Fox's two broadcasts and determine if that policy is vague. If it is, the 2nd Circuit could also be affirmed as to the ABC case. The 2nd Circuit remanded to FCC for new policy-making, and there would be no reason for this Court to do anything further. See ABC's 2nd Circuit Supplemental Brief, p.8, referring to the "vagueness decision": "The binding precedent established in the *Fox* Court entitles petitioners to all the relief they have sought. There is thus no need to address any other issue."

The 2nd Circuit also erred by including FCC's *Golden Globe Order* in regime it found vague. The two subject Fox programs found indecent were broadcast in 2002 and 2003, when the 2001 Industry Guidance applied. FCC did not make the findings until after the 2004 *Golden Globe Order*, so did not apply that policy, which was therefore not before the 2nd Circuit.

The 2nd Circuit said it did not find persuasive the one "vagueness" precedent, from the DC Circuit, *Action for Childrens' Television v. FCC, 852 F. 2d 1332.* Then Court of Appeals Judge Ruth Bader Ginsburg, writing for the Court, upheld FCC's current definition of broadcast "indecency", and prior policy, against vagueness challenges.

The 2nd Circuit stated "we do not suggest that the FCC could not create a constitutional policy" and that under *Pacifica, supra,* the consideration of "context" has been a policy "choice" of the FCC, not a court requirement. Pet. App. 30a. If this Court affirms the 2nd Circuit, FCC has the choice, on remand, of abandoning context as a factor.

Amicus argues for reversal of the 2nd Circuit instead, and possible remand only to expressly consider Respondents' remaining constitutional challenges to the 2001 FCC policy, notwithstanding the broader Question Presented, adopted by this Court. "It is always prudent to avoid passing unnecessarily on an undecided constitutional question." *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83.* (Quoted in ABC TV's 2nd Circuit Supplemental Brief, p.8).

The Question Presented, as adopted, goes beyond the vagueness ruling of the 2nd Circuit.

Unless Respondents show the 2001 Industry Guidance was inconsistent with *Pacifica,* it must be constitutional. The policy expressly relied upon *Pacifica*. It is possible the FCC erred in meeting *Pacifica*, but Respondents do not identify how.

The FCC's "current" regime, in the Question Presented, is as of the time of those broadcasts, the only relevant time frame, and when *Pacifica* clearly applied.

III.NO RESPONDENT HAS RAISED IN THE LOWER COURT ANY CONSTITUTIONAL CHALLENGE TO THE DIRECT REGULATION OF BROADCAST INDECENCY OR THE UNDERLYING AUTHORITY FOR THE FCC REGIME

On p.26 of its Reply Brief, Fox says it, in the 2nd Circuit, "challenged the FCC's very authority under *Pacifica*, and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)", citing Pet. App. 15a. However, the only statement on Pet. App. 15a, from the 2nd Circuit, about any challenge is: "The networks argue that the world has changed since *Pacifica* and the reasons underlying the decision

are no longer valid." But, Fox's 2nd Circuit brief ONLY challenged the "FCC's current regime" - NOT the underlying authority for it.

And, ABC's 2nd Circuit briefs alleged a "changed world" ONLY to argue that level of judicial scrutiny be modified, NOT as any challenge to FCC authority – entirely different matters.

Fox's Reply Brief, p.29, also falsely claims Petitioners have "put at issue the underlying constitutionality of direct regulation of broadcast content." "Direct regulation of broadcast content" was never challenged by primary Respondents in the 2nd Circuit. Now that Fox is in the Supreme Court, it is over-reaching all the way for its vision of utopia –complete deregulation of content broadcast. This amicus expects Fox and ABC will arrange their briefs' arguments FIRST toward permanent elimination of content regulation (even obscenity), which are NOT before the Court, and only secondarily argue the Question Presented, as limited by the Court to FCC regime/policy.

ABC's Reply Brief, p.25, cites *Yeager v. U.S.*, 129 S. Ct. 2360. A prevailing party may defend its judgment on any grounds, BUT ONLY if it was "properly raised below." No challenge to direct regulation of broadcast content or indecency, or to FCC's underlying authority, has been raised below,

AT ALL. It is now too late, under this Court's precedents.

Fox's 2nd Circuit brief, p.3, admits the FCC regime **enforces** the statutory regime of 18 U.S.C. 1464, so they are two DIFFERENT and separate regimes - administrative and statutory.

ABC only argued the V-chip in the 2nd Circuit to vacate the indecency finding as to the specific NYPD Blue program. ABC did NOT argue the V-chip for its separate argument that the level of scrutiny should change, as it now does for the first time in its Reply Brief. ABC did not make that latter V-chip argument in the 2nd Circuit, and *Yeager* precludes it in this Court as grounds to defend the judgment.

A constitutional challenge to the underlying authority for FCC policy would not even be within the scope of ABC's OWN Question Presented! In violating Rule 14 anyway, ABC could have drafted a Question that encompassed the underlying authority within its scope, but failed to do so. Nothing was more fair to ABC than allowing it to frame the Question, but it must now at least be held to the specific scope of that question (*Beck, supra*) and also the issues that it properly raised in the 2nd Circuit (*Yeager, supra*). At some point, Respondents must be held accountable to some

semblance of laws, rules, limits, and/or their own promises and actions.

IV. THIS COURT SHOULD APPLY, AND NOT DISTURB, ITS *PACIFICA* PRECEDENT, DUE TO BOTH STARE DECISIS AND UNCHANGED FACTUAL BASIS; IN THE ALTERNATIVE, IF *PACIFICA* WERE OVERTURNED, 18 U.S.C. 1464 IS CONSTITUTIONAL ON A "24/7" BASIS

These remaining arguments are made in the alternative. This is amicus' only briefing opportunity. These arguments must be raised here, prospectively, in the event Respondents violate Rule 24 by attempting to add to the Question Presented a challenge to underlying authority for FCC regime. Also, word limits prevent full arguments, so amicus summarizes its alternative arguments on underlying authority. Amicus requests further briefing IF the Court were to consider underlying authority for FCC policy, beyond the limited certiorari. Such full briefing would be critically necessary for the Court to receive sufficient information and arguments needed to make a decision thereon, and for the protection of all Americans.

A. This Court should follow its *Pacifica* precedent

Stare decisis dictates this Court follow *Pacifica, supra*, in which it established the constitutionality of statutory broadcast indecency restrictions, and FCC regulation. The judicial restraint argument on p.12 applies. First Amendment case precedent is very important, and should be adhered to by each individual Justice of the Court, under his/her oath of office. In the instance of broadcast indecency, *Pacifica* is the only direct Supreme Court precedent.

See Intervenor Respondent ABC Affiliates' Reply Brief, p.30: "In particular, it is unnecessary for the Court to reconsider the 'special treatment' given the regulation of broadcast indecency...", and, "It is a long- settled jurisprudential rule that the Court 'will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' ", citing *Kremens v. Bartley, 431 U.S. 119.* Further citing Justice Branheis' concurrence in *Ashwander v. Tennessee Valley Authority, 297 U.S. 288*, that the "Court will not anticipate a question of constitutional law in advance of the necessity of deciding it", ABC Affiliates went on to say, "the Court should not reach out to address .... the principles underlying

the Court's decisions in *Pacifica* and *Red Lion* that are unnecessary to resolution of this case."

The FCC regime protects First Amendment rights of broadcast viewers and listeners, which *Pacifica* permanently established as outweighing broadcasters' rights.

There is a constitutional right of government to place reasonable regulations on speech. Neither the First Amendment nor 18 U.S.C. 1464 have been amended since the latter was found constitutional in *Pacifica*. Constitutionality of the statute is a function of that statute and the First Amendment. In the absence of amendment, the Supreme Court's finding of constitutionality of 18 U.S.C. 1464 in *Pacifica* is permanent. Respondents have not cited any law to the contrary. The only thing of legal significance that has changed since *Pacifica* is FCC policy.

Unlike other cases in which this Court has sustained First Amendment challenges to indecency statutes for non-broadcast technologies (internet, telephone, and cable television), this is NOT a case of first impression.

However, this Court has, in *Reno v. ACLU, 521U.S. 844 (1997)* re-confirmed the constitutional viability of broadcast indecency restrictions, by

distinguishing broadcasting from the private subscription-only medium of the internet.

Supreme Court decisions are not "obsolete", as Respondents' refer to *Pacifica* and *Red Lion* in their Reply Briefs with obvious disdain, but instead are current law.

This Court, in *Pacifica*, expressly defined "pervasiveness" and why it is "unique" for broadcasting, based on facts that by their nature CANNOT possibly change. This Court does not need to take amicus' word for this; it has its own words from *Pacifica*:

"First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder. *Rowan v Post Office Dept., 397 U.S. 728, 990 S. Ct. 1484, 25 L.Ed. 2d 736.*"

Primary Respondents' Reply Briefs argue against *Pacifica*, alleging that "changes in the media landscape", "technological changes and the proliferation of numerous other media sources" impact the "factual underpinnings" of the decision.

In U.S. jurisprudence, we apply the law to the facts, not vice versa. In the Court of Appeals, CBS argued changes in facts can change constitutionality of a statute, but none of the cases it cited supported that argument.

Primary Respondents seek to eliminate all laws that make them accountable for their indecency by alleging two "changed facts": 1) proliferation of other media, and 2) the "V-chip" (discussed later).

Since *Pacifica*, there have been new media, but they are not relevant to broadcasting. In brief after brief, Respondents have stubbornly persisted in misrepresenting to courts what "pervasiveness" means, claiming that new media renders broadcasting less "pervasive", as if it is somehow a market share comparison between media. They know better, because numerous amicus briefs, served upon them, have pointed out that other media have nothing to do with "pervasiveness", PURSUANT TO THE SUPREME COURT'S DEFINITION. And, the 2nd Circuit has twice erred in findings by falling for those misrepresentations. *Pacifica* tells us "pervasiveness" is the extent to which a medium, particularly broadcasting, "pervades" or is present in the lives of "all Americans", and "confronts citizens not only in public, but in the privacy of the home."

Pervasiveness is a characteristic of the nature of the individual medium itself - regardless of any other media – according to this Court.

The key word in *Pacifica's* "pervasiveness" leg is "**uniquely.**" While cable TV, internet and other media have themselves become more "pervasive" since *Pacifica*, this case is not about pervasiveness of those mediums. Broadcasting is **uniquely** pervasive in and of itself, due to its nature.

Pacifica's finding that broadcasting "is a uniquely pervasive presence in the lives of **ALL** Americans" cannot be understated. **"ALL"**, by all legal and ordinary definitions, means 100%. TV broadcasting is still present in the lives of **ALL** Americans. Even those with no TV at home encounter it in public. The Supreme Court found that is why broadcasting is **uniquely** pervasive. So, legally, it makes no difference if even 99% of Americans subscribe to cable TV. Cable still does not have broadcasting's **unique** pervasiveness into the lives of **ALL** Americans. Even if 100% of all Americans subscribed to it, cable would not be pervasive **in the same unique way as broadcasting**. The same applies for other media.

Respondents would like to say, "87% is close

enough." That is not the law from this Court, or the definition of "ALL." And the 13% or so who choose not to subscribe to cable cannot be forced to receive daytime indecency. It is this Court's job to protect minorities.

Respondents refer to 87% of Americans subscribing to cable/satellite TV as if they all subscribe to indecency. But the cable industry's published statistics show that less than 50% of subscribers have ever subscribed to any "premium" channel, like Playboy, Cinemax, HBO, or Showtime, that have more indecency than broadcasting. Basic cable generally has less indecency than network television, so less than 44% of Americans have ever subscribed to TV indecency, contrary to the image portrayed by Respondents. Indecency cannot be imposed on the other 56+%, to whom is may be a most important personal life choice to avoid it.

Broadcasting is unique because it alone uses the public airwaves, a fact that also has not changed, and cannot, no matter how many statistics Respondents cite. The airwaves are owned by the citizens, not the broadcasters. They are a public place, NO DIFFERENT than a public street, sidewalk or park. They go into the home, without a consenting adult having to subscribe to anything or pay a fee. A broadcast TV or radio merely needs a power source.

Pacifica was not based just on accessibility of broadcasting in the home, but in all public places. Broadcasting goes into schools, day care centers, nursing homes, restaurants, lodging places, and stores (including electronic stores where televisions are on for all to see and hear).

Pacifica's "unique pervasiveness" leg was not based on other media, technical limitations, or parental control, but solely on the nature of broadcasting. Broadcast television and radio are still the ONLY media that indiscriminately go into the homes of "**ALL AMERICANS.**"

Some additional factual findings in *Pacifica* are:

> "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent radio is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place."

Let us look at these facts specifically. First, the broadcast audience "is constantly tuning in and

out." Respondents have not challenged this fact, nor can they, because it simply has not changed. Therefore, it remains just as true now as in 1978 that "prior warnings" cannot protect the viewer. To the extent the subject NYPD Blue show was preceded by a content warning, for example, such has been rejected by *Pacifica*. The basis for that law has not changed.

Next, the Supreme Court found no one need take any "first blow" of indecency, no more than one need take a physical assault of another nature. Consistent with realities of life, a) there is no constitutional immunity for assault, even for indecency types of assault, and b) a harm that has already taken place cannot be avoided, so must be prevented. The most important thing recognized by *Pacifica* is that harm must be prevented in the first place - zero tolerance.

Pacifica was also expressly based just as much on the rights of non-consenting adults as it was on protection of children.

All of the above facts are just as true now as in 1978, but Respondents never talk about THOSE facts that legally DO matter.

Instead, Respondents keep referring to the "V-chip" (to be discussed later), and other private media

subscribed to by consenting adults, neither of which are relevant.

Respondents would like the law to ignore any difference between private subscription media, like cable or internet, and public broadcasting, so they can use their broadcasts to compete with them. But they are completely different industries. The broadcasters may as well try to use the airwaves to compete with adult theaters and bookstores.

B. In this Court's first decision in this case, then-Justice Stevens favored the "continued wisdom of *Pacifica*", and disagreed with Justice Thomas' concurrence, which contained a flawed legal and factual basis

In this Court's first decision in this case, on administrative law, seven justices declined to address constitutional matters, or *Pacifica*. Two justices, Stevens and Thomas, did comment. Justice Stevens, dissenting, wrote favorably of the "continued wisdom of *Pacifica*", and disagreed with Justice Thomas' questions about that case. Justice Stevens "was there" – part of the *Pacifica* decision – and understood it.

Perhaps because no constitutional issues were briefed, argued, or before the Court, Justice

Thomas' concurrence contained numerous errors of law and fact, and a misunderstanding of *Pacifica*. Those errors and misunderstandings were as follows:

1. Justice Thomas stated *Pacifica* was based on scarcity of spectrum space. In the 2nd Circuit Fox case, Intervenors ABC, CBS, NBC, et al correctly stated in their brief, at p.20, fn.10:

> "*Pacifica* did not rely on 'spectrum scarcity' to justify indecency regulation and the Commission has confirmed that 'it is the physical attributes of the broadcast medium, not any purported diminished First Amendment rights of broadcasters based on spectrum scarcity or licensing, that justify channeling indecent material.'"

The 2nd Circuit Fox case brief of Intervenor ABC Affiliates, at p.13, pointed out that scarcity and limits on spectrum space are "laws of physics" that " have not changed" due to any evolution of the media marketplace. The facts and laws of physics, admitted by Respondents, prove the continued viability of both *Pacifica* and *Red Lion*,

while disproving the comments of Justice Thomas.

2. Justice Thomas stated cable TV is no more intrusive than broadcast TV, ignoring the indisputable fact that cable TV does not "intrude" at all. It only goes where "invited", by subscription by a consenting adult! Broadcasting, on the other hand, does "intrude" upon everyone, everywhere – as correctly and expressly found by this Court in *Pacifica*, which correctly alluded to broadcasters as "intruders."

3. Justice Thomas also misunderstood the "unique pervasiveness" analysis of *Pacifica*, perhaps having been misled by the continued mischaracterizations of it by the networks and the 2nd Circuit, as discussed in the prior arguments. Justice Thomas also relied upon unilateral comments of former commissioner Furchgott-Roth, that were also contrary to the above laws. Justice Thomas also ignored the fundamental, yet most critical, distinction between the airwaves owned by the public, licensed for use as a privilege, and other means of delivery of

subscription media over privately owned cable and wireless systems.

4. Justice Thomas said the meaning of the law cannot turn on "modern necessity" or facts – which amicus argued above. But then Justice Thomas himself proposed to upset legal precedence, due not only to factual developments, but false facts at that. A true textual approach to this issue would necessarily restore literal meaning to 18 U.S.C. 1464 by prohibiting ALL broadcast indecency (under policy that is not vague) "24/7" as a reasonable restriction of speech in a public place, consistent with many Supreme Court precedents. It must also necessarily apply to *Pacifica's* reference to **ALL AMERICANS** as meaning 100%.

5. Justice Thomas' concurrence was based in large part on unofficial, personal opinion of one FCC staffperson named Berresford, which is not legal authority, is contrary to law and fact, and cannot possibly form any basis for change in law.

C. In the alternative, if this Court were to overturn *Pacifica*, the indecency prohibition in 18 U.S.C. 1464 is constitutional 24 hours a day

If this Court were to overturn *Pacifica*, it should continue to find the indecency prohibition in 18 U.S.C. 1464 constitutional, but that the "time channeling" ("safe harbor") FCC policy, allowing nighttime indecent broadcasts, was wrongly upheld. Current and most recent FCC policies since 1978, permitting indecent broadcasts after 10 p.m., resulted from *Pacifica*.

But *Pacifica* clearly reveals this Court did not decide on "time channeling" on its own. The Court did act properly by not going beyond the relief requested by FCC or any amicus. But the FCC, as the case "prosecutor", did not ask to enforce nighttime restrictions. However, FCC never had ANY authority to implement a "time channeling" policy or argue for it in court. Its Congressional mandate was, and still is, to enforce 18 U.S.C. 1464 as written, prohibiting indecent broadcasting at any time. The statute does not hint of "time channeling." FCC illegally deviated from its mandate, which *Pacifica* and later cases perpetuated.

The First Amendment applies to Congressional

acts, and if those are unconstitutional, it is for the courts alone to say. The failure of FCC administrations in the late 20th century to enforce 18 U.S.C. 1464 as written caused a mess of administrative and judicial law. This "parade of horribles" has caused irreparable and incomprehensible damage to millions of Americans and the nation's society.

If it goes beyond the Question Presented as to FCC regime, to questions as to FCC underlying authority not raised by Respondents, and reconsiders *Pacifica*, then the Court can and should find 18 U.S.C. 1464 constitutional 24 hours a day as argued by this amicus. *Turner v. Rogers. 131 S. Ct. 2507.* This would restore constitutional and statutory order to the legal situation, and begin to prevent further decline of American society and decency.

V. *PACIFICA* REJECTED TECHNOLOGY AS ANY SUBSTITUTE FOR DIRECT REGULATION OF BROADCAST INDECENCY, AND THE "V-CHIP" HAS NO LEGAL SIGNIFICANCE, ESPECIALLY SINCE RESPONDENTS ACTIVELY CIRCUMVENT ITS TECHNICAL ABILITY TO BLOCK THEIR PROGRAMS

A. This Court in *Pacifica* rejected technology as any substitute for direct regulation of broadcast indecency

The "V-chips" of 1978, and many years before and after, were the on/off and channel buttons, same as for radio. This Court, in *Pacifica*, decided:

"To say that one may avoid further offense by turning off the radio when he hears indecent radio is like saying that the remedy for an assault is to run away after the first blow."

Pacifica recognized listeners could partially control what was heard on the radio by the on/off button, and certainly also the channel dial, but completely rejected arguments that such parental controls rendered direct regulation of broadcast indecency unconstitutional. Today, for broadcast TV, the additional "V-chip" may prevent some programming, but the legal principle is unchanged, as are citizens' rights to not take a "first blow" of

indecency. *Pacifica* rejected technology as a substitute for law; technology does not conversely have any power to reject *Pacifica* as the law. As a nation, we serve the law; not technology.

B. The V-chip has no legal significance

Congress intended the V-chip legislation to compliment and supplement (not supplant) direct regulation of broadcasting. Due to public outcry about exponential increases in broadcast television indecency, Congress provided this additional tool to viewers. During the process, Congress and the President repeatedly and clearly stated this intent in public. None of the congressional records or presidential statements cited by NBC in the 2nd Circuit supported their argument the V-chip would be more effective and less intrusive than direct regulation.

In 2006, Congress greatly increased the indecency fines, refuting any argument that it intended the V-chip to replace regulation.

It was also the intent of all four Respondent networks, reported to the public through their respective news bureaus, that the V-chip not replace regulation. The networks agreed with Congress that, in exchange for V-chip legislation, and a promise by some Congressional leaders of a

three-year moratorium on further legislation, they would never under any circumstances use the V-chip or TV ratings to argue in court against FCC regulation. Parents Television Council prophetically warned that they would renege. Now, here are Respondents, poised to argue to the Supreme Court that the V-chip negates the need for policy - exactly what they promised the nation they would never do. They must be held accountable to their promises to the public and Congress, which contractually estop them from any legal challenge based on the V-chip.

The argument that a V-chip for TV has undermined *Pacifica*, a radio case, is nonsensical. There is no V-chip or other blocking technology for broadcast radio. The necessity for direct regulation from that fact is discussed later.

Even if there were some conflict between 18 U.S.C. 1464 and the V-chip legislation, it would at most be a legislative issue for Congress to resolve. There is no constitutional crisis or judicial issue from the V-chip. If there is any statutory conflict, it is the V-chip legislation that needs to be repealed as a dismal and total failure.

The V-chip is a creature of law, unlike the

technologies in *Reno, supra*; *Ashcroft v. ACLU, 542 U.S.* 656; *Sable v. FCC, 492 U.S. 115*; and *U.S. v. Playboy Entertainment Co., 529 U.S. 803.* Those narrow decisions are all distinguishable because they involved new media and had no case precedent, like we have herein. In those cases, there was no public resource (such as the airwaves), and no regulatory agency like the FCC with a body of developed policies and community standards, and a Congressional mandate. Enforcement of 18 U.S.C. 1464 is THE reason Congress created the FCC, and that remains its core, central function.

Reno addressed a criminal statute providing for incarceration.

The argument that FCC should have a new policy that just says "V-chip" makes no sense. The V-chip does not carry out Congress' mandate to the FCC, and does not involve any governmental role. The V-chip is a technology, not a policy.

C. Respondents prevent the V-chip from blocking programming by mis-rating most shows, and the V-chip is ineffective

The V-chip is not only ineffective, it is worthless and useless, a failed experiment gone awry.

There is no V-chip in televisions with less than a 13 inch screen. Pet. App. 16a. In the 2nd Circuit, Respondents cited statistics of the number of TV's sold since that legislation, but have not broken down the number with small screens, rendering those statistics useless. And, generally smaller televisions end up in the smallest childrens' bedrooms. So, how can the V-chip be effective for those TV's in which it does not exist?

Contrary to Respondents' arguments, many digital televisions do NOT have V-chips. FCC investigation found 7 manufacturers do not install V-chips in their TV's sold in the U.S. *Funai Corp.*, Notice of Apparent Liability for Forfeiture, 22 FCC Recd. 19663 (2007). Therefore, the V-chip does not exist for purchasers of those televisions as well.

Digital converter boxes for analog TV's, some of which do not have V-chips anyway, had not been invented at the time of the subject indecent TV programs, so are not legally relevant to the outcome of this case.

In *Reno, Ashcroft, Sable,* and *Playboy*, all *supra*, the technologies did not involve reliance upon ratings assigned by humans, much less those employed by adversarial parties, as do the TV ratings upon which the V-chip relies. The FCC has found the V-chip ineffective partly for that

reason. Pet. App. 85a. The V-chip is, unlike those other technologies, NOT a "parental control", but rather, a "network control."

Respondents fail to rate many of their programs at all, rendering the V-chip nonexistent to block them.

When programs are assigned TV ratings, they are mis-rated BY RESPONDENTS at least 68% of the time (Pet. App. 83a), sometimes off by TWO ratings (i.e., TV MA material rated TV PG)! That is even when, unlike the two subject Fox live shows, the network has produced the exact scripted content. Programs are mis-rated as suitable for children, when they are not according to the clear rating criteria – almost never the opposite. This mis-rating is done deliberately by Respondents, in order to not reduce the audience size and thereby lower advertising rates. The V-chip is controlled by a financial incentive.

A .320 batting average is great for a baseball player, but pathetic for rating of TV programs under clear criteria. While Respondents are in this Court touting the V-chip as an effective substitute for direct regulation, they are simultaneously acting to keep it from working or blocking their programs.

This evidence in the record, alone, is sufficient for

the FCC to meet its burden of proving ineffectiveness of the V-chip. On the other hand, there is NO evidence or record of effectiveness.

Respondents have tacitly admitted their 68% error rate by not citing anything to the contrary at any time. On remand in 2006, FCC had a 60 day comment period, and no Respondent presented any evidence.

Respondents have thereby circumvented and thwarted the technical function of the V-chip by assigning false ratings. Is this field of law now going to be built entirely on a lie, as well?

V-chips do NOT block all indecent material, as Respondents argue. There is no "indecent" setting on the V-chip.

Respondents cite *Sable, supra*, requiring blocking technology be "effective" to achieve a compelling governmental interest, but the V-chip, even where it exists, is nowhere near effective under *Sable*.

Respondents have also cited *Playboy, supra*, to say technology does not have to be 100% perfect. Setting aside that the record shows the V-chip is less than 32% perfect, *Playboy* is misapplied. In *Playboy*, there were faulty blocking mechanisms that allowed "signal bleed" of some visual/audio of

the cable Playboy Channel into homes of cable subscribers who had not subscribed to that channel. First, because it was cable, there could only be a problem if there was a subscription to begin with. Second, only a small percentage of subscribers had the problem. This Court found that the law was unconstitutional expressly because, by statute, BLOCKING TECHNOLOGY HAD TO BE INSTALLED FOR FREE WITHIN 24 HOURS OF A FREE PHONE CALL FROM THE SUBSCRIBER TO THE PROVIDER.

So, to apply *Playboy* to this broadcasting case, the V-chip could only possibly be effective if Respondents installed them for free within 24 hours of a free phone call to them by any U.S. resident. They have not been bound to that, unlike in *Playboy*.

ABC's Reply Brief has the audacity to say that the V-chip is more effective than blocking technology for some other media, without ANY evidence!

It is not enough to meet *Sable* or *Playboy* for everyone to just throw up their hands and say to viewers and children, "Oh well, we tried! We put some technology out there before we eliminated direct regulation, even if it doesn't work." That would accomplish nothing.

Citizens do not have any burden or responsibility to pay the cost of V-chips to AVOID indecency. That would be perverted and backwards. Decency must remain the norm, and indecency the exception.

How are citizens to use a V-chip to protect themselves, their children, and their established constitutional rights from any "first blow" of TV indecency in public places, such as restaurants, where they do not have access to program a V-chip? Respondents have not answered this, because they cannot.

By challenging direct regulations, and controlling the V-chip through mis-ratings, Respondents seek to become the sole arbiters of what everyone, even their opponents in this court case, must see or hear, without any escape, even in the home.

It is the laws and FCC that are protecting people FROM RESPONDENTS. Fox, the television network, seeks to guard the henhouse - and without any accountability or consequences when they slaughter all of the hens. As a corollary, would the U.S. build a missile defense system that relies on security ratings assigned by North Korea, Iran, and Red China, and then based on that, find the military is unconstitutional?

But the Court need not surmise about "effectiveness." This case has absolute proof the V-chip does not work at all, in the two subject Fox awards programs. Both programs were rated "TV –PG", but contained unedited expletives clearly requiring "TV-MA" rating for "adults only" under the criteria. Even diligent parents who programmed their V-chip to block TV-MA material were still confronted, along with their children, with TV-MA material. It does not matter that Fox probably did not know that third parties would utter those expletives in live programs. The point is, the V-chip did not work, does not work, and is not a basis for any Court ruling, unlike blocking technology for other media.

Any FCC statement of V-chip effectiveness, in its 1998 Implementation record, was merely prediction before actual implementation. FCC could not predict Respondents would deliberately render the V-chip ineffective with false ratings. Respondents' arguments are negated by their own actions.

Parents, government, and broadcasters all have roles in protecting children from indecency. However, the networks are now shirking their responsibilities, while trying to permanently eliminate any government role and keep parents from blocking indecent programming. They now want to force indecency on children, rather than

protect them. The regime they want is that neither direct regulation NOR V-chip can stop their indecency.

The most effective and diligent parents cannot protect their children without government help. It is harder for working parents and single parents. Plus, neglected children have the same right to be protected as children who have diligent parents. It bears reminding that by law, everyone under 18 years of age is a child unless emancipated.

VI. THERE IS NO BASIS UPON WHICH TO APPLY STRICT SCRUTINY TO BROADCAST RESTRICTIONS.

Primary Respondents want strict scrutiny applied to broadcasting. The existence of other media to which strict scrutiny has been applies is not any reason to apply it to broadcasting. And, the V-chip has been distinguished from other blocking technologies above.

Unlike the *Reno*, *Ashcroft*, *Sable* and *Playboy* cases, this Court has already scrutinized the broadcast indecency restrictions, in *Pacifica*. There is not only legal authority for lesser scrutiny of broadcast restrictions, it is authority from this High Court.

This Court in 1997, in *Reno*, expressly reconfirmed the special treatment for broadcasting. Respondents have cited no legal authority for their proposition that the level of scrutiny for a medium, once established, be continually reconsidered.

Respondents ignore the infinite legal difference between scrutiny to be applied to government attempts to regulate privately owned and distributed media (cable TV, internet, or telephone in the *Playboy, Reno, Ashcroft,* and *Sable* cases) that is subscribed to by paying, consenting, private adults, versus regulation of the government's own airwaves, held in trust for its citizens and public use, that go into EVERY citizens home and public place, no different than any other public place. Respondents' arguments are akin to saying that the legality of nudist colonies should eliminate all indecent exposure laws, or that there is no legal difference between consensual adult sex and forceful, unsolicited sexual assault.

These are the reasons the 2nd Circuit said it "could not think of."

Respondents seek *Reno's* strict scrutiny, but distance this case from *Reno's* explicit exemption of broadcasting from that scrutiny. They cannot have it both ways. Either way, *Reno* does not apply to broadcasting. Nor do *Ashcroft, Sable,* or *Playboy.*

VII.NO RESPONDENT HAS EVER CHALLENGED 18 U.S.C. 1464, AND ITS INDECENCY RESTRICTIONS ARE PERMANENTLY CONSTITUTIONAL.

No Respondent has ever challenged 18 U.S.C 1464 in the Court of Appeals. *Yeager, supra*, cited by ABC, precludes any challenge in this Court, as not having been properly raised.

18 U.S.C. 1464 is part of the "Radio Communications Act", passed in 1927, and amended in 1934. Television usage became widespread afterward, and the Act has apparently been applied to TV as a form of radio transmission. Deference to Congress is required. If this Court were to ever (wrongfully) find 18 U.S.C. 1464's indecency provisions unconstitutional, it would necessarily apply to both radio and TV, as the statutory restrictions are either constitutional, or they are not. Yet, there is no V-chip for broadcast radio. The net result would leave the nation without ANY protection from radio indecency – "anything goes."

Intervenor Respondent ABC Affiliates' Reply Brief, at p.30, correctly states, "In particular, it is unnecessary for the Court to reconsider ..... the congressionally-mandated public trustee regulatory framework for broadcast media the Court approved

in *Red Lion".*

Unlike direct regulations ruled unconstitutional for non-broadcast media, this statute is not recent. For over 80 years, all Americans, consciously and subconsciously, have completely relied upon 18 U.S.C. 1464 for protection against indecency. Most Americans have never known life WITHOUT the foundational daily fact of that protection, as they go about their affairs at home and in public places. It is well known that there are just some things that cannot be shown or said in broadcasting. Because of that statute, people are free to have radio or TV on, without fear, no matter who they are with or where they are, during daytime hours. To strike down the statute would be the greatest travesty in U.S. judicial history, pulling the rug out from all citizens' safety.

Government has a "legitimate state interest" in maintaining "a decent society." *Paris Adult Theater I v. Slaton, 413 U.S. 59-60.* It is impossible to maintain a decent society if the pervasive public place known as the "broadcast airwaves" is full of indecency.

The courts have found that virtually nothing is legally obscene. For example, the infamous

XXX-rated movie "Deep Throat", full of explicit oral sex, is not obscene. Respondents are asking for a legal "right" to broadcast such hard-core pornographic, but not obscene, programs during the daytime.

America's citizens have every right to regulate THEIR public airwaves, through their Congressional representatives, to protect themselves from indecency. Broadcasters use airwaves as a free, licensed privilege, which carries some obligations.

VIII. EVEN THE SUPREME COURT LACKS POWER TO FIND UNCONSTITUTIONAL ALL "DIRECT REGULATION OF BROADCAST INDECENCY OR CONTENT", OR PREVENT CONGRESS FROM NEW ATTEMPTS TO DIRECTLY REGULATE BROADCASTING.

Primary Respondents' Reply Briefs argue that direct regulation of broadcast indecency, or even "content", are unconstitutional. The most the Supreme Court could ever do is find a statute unconstitutional, as it did in *Reno* and other cases. Congress has constitutional power to pass new legislation that addresses any constitutional issues,

and cannot be precluded from direct regulation of the public airwaves.

Respondents wish for a finding that all direct regulation of broadcast "content" is unconstitutional, but that is impossible, as it would include obscenity, which is not speech, nor entitled to constitutional protection.

Direct regulation is not a real issue in this case, since direct regulation of broadcast obscenity is constitutional. And broadcast indecency is already allowed during safe harbor hours. So, the only issue is daytime indecency. Respondents have not presented any reason why same should be permitted now.

If direct federal regulation of the airwaves were to ever end, the federal government would no longer be "pre-empting the field", and any state or municipality would be free to pass its own direct restrictions on broadcasting coming into or going out of that place. That would be subject to state, not federal, court jurisdiction, and would result in a confusing mish-mash of laws across the nation.

CONCLUSION

This amicus requests the Court to stick to its limit of certiorari to the Question Presented, and ONLY address issues of constitutionality of the FCC 2001 Industry Guidance policy. It is requested that policy be held not vague, and constitutional. If this Court finds policy unconstitutional, affirmation of the 2nd Circuit remands the case to the FCC for further policy making procedures.

Beyond FCC policy, there are no other constitutional issues before this Court, especially as to underlying authority for FCC regime. This Court would have to ignore ALL of the following: 1) its limit on certiorari, 2) its own rules, 3) all its case precedents, 4) ABC's own limitations on the scope of its Question Presented, 5) Respondents' failure to raise any issues beyond FCC policy, 6) the 2nd Circuit's decision only going to vagueness of FCC policy, 7) the 2nd Circuit's errors, 8) stare decisis, 9) the unchanged facts underlying *Pacifica*, 10) *Reno's* confirmation of special treatment of broadcasting, 11) the lack of any legal authority to change the level of scrutiny, 12) the lack of existence of any V-chip for radio, or for many TV's and digital converter boxes, 13) Respondents' prevention of the V-chip from blocking their programs, AND 14) this Court's lack of power-

in order to invalidate direct statutory regulation of broadcast indecency or content.

This Court should decline Respondents' invitation to join them in never playing by any laws, rules, or limits.

Wherefore, the judgment of the U.S. Court of Appeals for the Second Circuit should be reversed, and judgment directed in favor of Petitioners, affirming its determination.

Respectfully submitted,

Thomas B. North

Counsel for

Decency Enforcement Center for Television

September 12, 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1293

IN THE
SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

ABC, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

J. Robert Flores, Esq. (*Counsel of Record*)
HAMPTON ROAD STRATEGIES, LLC
10410 Hampton Road
Fairfax Station, VA 22039
Tel.: 703-609-8731
Fax: 703-425-5018
rfloresesq@cox.net
Additional counsel listed on reverse

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COUNSEL FOR *AMICI CURIAE*

Christopher M. Gacek
FAMILY RESEARCH COUNCIL
801 G. Street, N.W.
Washington, D.C. 20001
Tel.: 202-393-2100
Fax: 202-393-2134

Carissa B. Mulder
1320 N. Veitch Street, #1001
Arlington, VA 22201
Tel.: 623-341-0993
Fax: 602-938-3550

Joel B. Campbell
YRULEGUI & ROBERTS, P.C.
7576 North Ingram, Ste. 104
Fresno, CA 93711
Tel.: 559-222-0660
Fax: 559-322-2880

Hannah Michelle Livingston
VINTAGE PRODUCTION CALIFORNIA, LLC
9600 Ming Avenue, Ste. 300
Bakersfield, CA 93311
Tel.: 661-869-8241
Fax: 661-869-815

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE PACIFICA COURT'S REASONS FOR UPHOLDING A BAN ON BROADCAST INDECENCY STILL HOLD TRUE TODAY 4

A. Non-Consenting Adults Still Have a Right to be Left in Peace in Their Homes 5

B. Children Still Deserve Protection from Indecency 9

C. Broadcast Bandwidth Continues to Grow More Scarce 12

II. THE FCC'S CURRENT INDECENCY REGIME DOES NOT VIOLATE THE FIRST OR FIFTH AMENDMENTS BECAUSE IT IS NOT IMPERMISSIBLY VAGUE AND DOES NOT HAVE AN IMPERMISSIBLE CHILLING EFFECT. 14

A. The FCC's Current Enforcement Policy is Not Unconstitutionally Vague Because It Provides Clear

Notice to Broadcasters Regarding What Content is Indecent. 15

B. The Potential "Chilling Effect" Under the FCC's Current Enforcement Regime is No Greater than that Under the Previous Policy, which has Already Passed Constitutional Muster in *Pacifica*..... 19

C. A Context-based Approach to Determining Indecency Will Not Chill Constitutionally Protected Speech. 22

D. The Potential "Chilling Effect" is Mitigated by a "Safe Harbor" for Broadcasts between 10:00 p.m. and 6:00 a.m. 22

E. Any Potential "Chilling Effect" of the Indecency Regulations is No Greater than that Imposed by Regulation of Obscenity..... 24

III. STRICT SCRUTINY IS INAPPLICABLE TO REVIEW OF INDECENCY RESTRICTIONS ON BROADCASTING. 26

IV. THE LIMITATIONS ALLOWED ON BROADCAST SPEECH ARE GROUNDED IN CONSTITUTIONAL PRINCIPLES THAT HEARKEN BACK TO AMERICA'S FOUNDING..... 27

CONCLUSION..... 29

TABLE OF AUTHORITIES

Cases

Action for Children's Television v. FCC,
852 F.2d. 1332 (D.C. Cir. 1988) 21, 23

In re Application of WGBH Educ. Found.,
69 F.C.C.2d 1250 (1978) 20

Brown v. Entertainment Merchants Assn.,
131 S. Ct. 2729 (2011) 26-29

Cohen v. California,
403 U.S. 15 (1971) 9

In re Citizens Complaint Against Pacifica Found. Station WBAI (FM),
56 F.C.C.2d 94 (1975) 5

Eckstein v. Melson,
18 F.3d. 1181 (4th Cir. 1994) 25

FCC v. Fox Television Stations, Inc.,
129 S. Ct. 1800 (2009) 12, 27

FCC v. Pacifica Foundation,
438 U.S. 726 (1978) ..... *passim*

Fox Television Stations, Inc., v. FCC,
613 F.3d 317 (2nd Cir. 2010) 17

Fox Television Stations, Inc., v. FCC,
489 F.3d 444 (2nd Cir. 2007) 17

Frisby v. Schultz,
487 U.S. 474 (1988) 8

Ginsberg v. New York,
390 U.S. 629 (1968) 9, 29

Hill v. Colorado,
530 U.S. 703 (2000) 6-9

Holder v. Humanitarian Law Project,
130 S.Ct. 2705 (2010) 17-18

Joseph Burstyn, Inc. v. Wilson,
343 U.S. 495 (1952) 28

Katz v. United States
389 U.S. 347 (1967) 6

Meyer v. Nebraska,
262 U.S. 390 (1923) 10

Miller v. California,
413 U.S. 15 (1973) 24-25

Olmstead v. United States,
277 U.S. 438 (1928) 5

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,
268 U.S. 510 (1925) 10

Red Lion Broadcasting Co., Inc. v. FCC,
395 U. S. 367 (1969) 12

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 18-19

Roth v. United States,
354 U.S. 476 (1957) 2

Rowan v. Post Office Dept.,
397 U.S. 728 (1970) 4-7

United States v. Petrillo,
332 U.S. 1 (1947) 25

United States v. Williams,
553 U.S. 285 (2008) 18

Ward v. Rock Against Racism
491 U.S. 781 (1989) 18

Wisconsin v. Yoder,
406 U.S. 205 (1972) 10

Statutes:

18 U.S.C. § 1464 .....4, 19

Other Authorities:

Brad Reed, "FCC Hauls in $19.6 Billion for 700 MHz Auction," *Network World* (March 19, 2008). ..13

Center on Media and Child Health at Children's Hospital, Harvard Medical School, and Harvard School of Public Health, www.cmch.tv/mentors_parents/messaging.asp 10

DANIEL PATRICK MOYNIHAN, *Defining Deviancy Down*, THE AMERICAN SCHOLAR (Winter 1993) 3

DIANE E. LEVIN, PH.D. and JEAN KILBOURNE, ED.D, SO SEXY SO SOON: THE NEW SEXUALIZED CHILDHOOD AND WHAT PARENTS CAN DO TO PROTECT THEIR KIDS (Ballantine Books, N.Y. 2008) 11

EILEEN ZURBRIGGEN, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS (Washington, D.C. 2007) 11

In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (2001) 15-16, 18

In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes" Awards Program, 16 F.C.C.R. 8003 (2004) 16

Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, FCC Spectrum Summit, "Unleashing America's Invisible Infrastructure," Washington, D.C. (October 21, 2010) 13

ROBERT BORK, SLOUCHING TOWARD GOMORRAH (New York: Regan Books 1997) 3

INTEREST OF *AMICI CURIAE*[1]

FOCUS ON THE FAMILY is a non-profit religious corporation, headquartered in Colorado, committed to strengthening the family in the United States and abroad by providing help and resources that are grounded in biblical principles. The president of Focus on the Family, Jim Daly, hosts the flagship Focus on the Family radio broadcast about family issues carried daily on 2,000 radio outlets in the United States and heard daily by 1.5 million North America listeners. Among the resources Focus on the Family provides are *Thriving Family* magazine and *PluggedIn*, which helps parents make wise media discernment choices for their families. *PluggedIn* resources include a website, PluggedIn.com, which receives more than 1 million visits every month, a mobile phone app, and 1- to 2- minute radio features that reach more than 6 million listeners weekly. Focus on the Family is concerned about the widespread distribution of obscenity and profanity.

FAMILY RESEARCH COUNCIL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and

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[1] The parties gave blanket consents to the filing of *amicus curiae* briefs. Pursuant to SUP. CT. R. 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, made a monetary contribution intended to fund the preparation of or submission of this brief.

advocates continuously on behalf of policies designed to accomplish that goal.

SUMMARY OF ARGUMENT

"[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Roth v. United States*, 354 U.S. 476, 483 (1957). *Amici* contend that society has a strong and abiding interest, firmly grounded in the First Amendment, in maintaining standards of decency. This interest extends especially to the preservation of standards of decency with respect to the materials broadcast into the sanctuary of our homes. This Honorable Court should not assume that the public clamors for more indecency, as Respondents and their supporters suggest. There is no evidence whatsoever that the Federal Communications Commission ("FCC") has been inundated with complaints of the lack of indecent programs on broadcast TV or radio. Rock singer Bono has no more right to shout "f***ing brilliant" in the homes of unsuspecting American families than we would have in his. Similarly, the indecent comments of singer/actress Cher and actress Nicole Richie are out of place in the homes of those families who thought that network television represented a safe haven for family viewing. Neither these personalities nor their network sponsors have rights under the U.S. Constitution greater than the rights of the homeowners they invaded over the public airwaves.

Over the past fifty years, some courts, in the name of expanding free speech rights, have ignored the interest in societal decency, the government's

interest in the protection of children from indecent content, and the right to be left alone, free from the constant barrage of indecent communications. This, coupled with lax enforcement on the part of the FCC of indecency law until the beginning of the previous decade, has enabled the purveyors of indecency to overrun the rights of decent Americans, who are now bombarded by degrading, indecent, coarse, and sexually charged content on an almost around-the-clock basis.

Emboldened by the success of their counterparts in other forms of media, broadcasters have been pushing the envelope by gradually imposing more and more indecent content on an unsuspecting public. Like the frog in the kettle, society is being coarsened while broadcasters have, in the words of the late Senator, Daniel Patrick Moynihan, "defined deviancy down." DANIEL PATRICK MOYNIHAN, *Defining Deviancy Down*, THE AMERICAN SCHOLAR 17 (Winter 1993), cited in ROBERT BORK, SLOUCHING TOWARD GOMORRAH 3 (New York: Regan Books 1997). The communications of broadcasters over the public airwaves have often radically diverged from the interests of the public itself that broadcasters are required to serve. Broadcasters now seek to invalidate all regulation of indecency on the public airwaves, leaving no safe haven whatsoever to the majority of Americans who desire decent programming.

Amici contend that it is critical to recognize the very real and vital societal interests in maintaining standards of decency, in conjunction with individual free speech rights. The FCC's revised guidance with respect to what constitutes indecency does exactly this and it does so well within the confines of the

First Amendment. Further, it logically follows the very type of context-based analysis endorsed by this Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The unproven claims of broadcast media that the FCC's action is uneven, arbitrary and capricious, do not provide sufficient reason to cavalierly toss aside the protections historically afforded the viewing public consistent with constitutional precedent. *Amici* urge this Court to follow that precedent and find that the FCC's action is a constitutionally permitted application of 18 U.S.C. § 1464.

American broadcast TV and radio are meant to be available to all. If the court opens the floodgates to so-called "adult material" at all hours on broadcast TV and radio in the name of the First Amendment, then TV and radio will be open only to adults, not children, and, at that, adults who desire only more indecent material. Television viewers will be forced to listen to indecent material. Profanity and sex will dominate daytime radio. Nothing in the First Amendment requires this result.

ARGUMENT

I. THE *PACIFICA* COURT'S REASONS FOR UPHOLDING A BAN ON BROADCAST INDECENCY STILL HOLD TRUE TODAY.

The *Pacifica* Court relied on several important reasons in announcing its decision upholding the ban on broadcast indecency. The first of these reasons was a recognition that viewers who did not consent to view indecency have a "right to be left alone" in their own homes. 438 U.S. at 748, citing *Rowan v.*

Post Office Dept., 397 U.S. 728 (1970). Second, the Court affirmed that the State has an important interest in protecting children from indecent material. Pacifica, 438 U.S. at 748. Third, the Court recognized that broadcast bandwidth is a scarce commodity that should be regulated in the public interest. Id. at 731, n.2 (citing *In re Citizens Complaint Against Pacifica Found. Station WBAI* (FM), New York, New York, 56 F.C.C.2d 94, 97, ¶ 9 (1975). Each of these reasons has only grown in force in the ensuing years since *Pacifica*.

A. Non-Consenting Adults Still Have a Right to be Left in Peace in Their Homes.

Pacifica affirmed the rights of all Americans who did not wish to be bombarded with indecent speech while listening to the radio or watching television, and that the individual's "right to be left alone" in the privacy of his or her home outweighed the rights of an intruding broadcaster to disseminate indecent communications. *Pacifica*, 438 U.S. at 748, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970).

This "right to be left alone" had previously been described by Justice Brandeis in his revered dissent in *Olmstead v. United States* as "the most comprehensive of rights and the right most valued by civilized men." 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Both the language and sentiment of Justice Brandeis' statement has continued to be a part of our jurisprudence to this day.

In *Rowan*, a case addressing the right of homeowners to opt out of unwanted advertisements sent through the mail, the Supreme Court held that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan*, 397 U.S. at 736.[2] Balancing the competing rights in that case, the Court acknowledged "we are inescapably captive audiences for many purposes," but that "a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail," and that the householder should be "the exclusive and final judge of what will cross his threshold" even if this has the effect of "impeding the flow of ideas." *Id.*

The Court continued: "[w]eighing the highly important right to communicate ... against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-737. The Court concluded:

> We therefore categorically reject the argument that a vendor has a right under

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[2] The Court has since opined that the common law "right to be left alone" is sometimes more accurately characterized as an "interest" that the States can choose to protect in certain situations. *See Hill v. Colorado*, 530 U.S. 703, 717, n.24 (2000), referencing *Katz v. United States*, 389 U.S. 347, 350-351 (1967). Whether the "right to be left alone" is defined as a "right" or an "interest" makes little difference in the argument as to whether it should be protected by the FCC in the circumstances of indecency flowing into one's own home. Whatever semantics are used, it has been consistently protected by our jurisprudence.

> the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

Id. at 738 (citation omitted).

There are certainly differences between *Rowan* and *Pacifica*. The former dealt with printed material sent through the mail, whereas the latter dealt with broadcast media. The statute discussed in *Rowan*, admittedly, merely allowed individual homeowners to affirmatively "opt out" of receiving certain mailings, whereas the *Pacifica* case allowed the FCC to regulate all broadcasts during certain times of day, whether or not the recipients of these broadcasts would have been subjectively offended by the content. Nonetheless, because of the unique characteristics of broadcast media the Supreme Court relied on the principles enunciated in *Rowan* to uphold the constitutionality of FCC regulation of indecency. *Pacifica*, 438 U.S. at 748-749.

Since *Pacifica*, the Court has continued to uphold the "right to be left alone" in one's own home articulated by Justice Brandeis. More recently, the Court stated:

> The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices [Brandeis] characterized as "the most comprehensive of rights and the right most valued by civilized men." The right to avoid unwelcome speech has special force in the privacy of the home and its immediate surroundings....

Hill v. Colorado, 530 U.S. 703, 716-717 (2000) (internal citation omitted).

The Court in *Hill* balanced this right to be let alone with the First Amendment rights of others, stating that, "The right to free speech ... may not be curtailed simply because the speaker's message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Id.* at 716 (citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988)). Thus, the intrusive nature of some speech is to be considered. The *Hill* Court further said:

> It may not be the content of the speech, as much as the deliberate "verbal or visual assault," that justifies proscription. Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes."

> The recognizable privacy interest in avoiding unwanted communication varies widely in different settings. *It is far less important when "strolling through Central Park" than when "in the confines of one's own home," or when persons are "powerless to avoid" it.*

Hill, 530 U.S. at 716, quoting *Cohen v. California*, 403 U.S. 15, 21-22 (1971) (emphasis supplied; internal citations omitted).

B. Children Still Deserve Protection from Indecency.

As the second reason for the holding in *Pacifica*, the Court held that "broadcasting is uniquely accessible to children, even those too young to read," *Pacifica*, 438 U.S. at 749, and expounded as follows:

> *Pacifica*'s broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held [in *Ginsberg v. New York*, 390 U.S. 629 (1968)] that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to

> broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

Id. at 749-750 (internal citations omitted).

The Court thus held that since broadcasting was uniquely available to children merely by turning on the television or radio, it could be regulated to a greater extent than other forms of media. This is still true today. The choices parents make to limit indecency, such as keeping television out of the home or accepting only broadcast television, should be respected.[3]

Moreover, the constitutional rule accords with sound scientific reasons for protecting children from indecent broadcasts. According to the Center on Media and Child Health at Children's Hospital at Harvard, media's influence on children is "integral to their growing sense of themselves, of the world, and of how they should interact with it."[4] The Center notes that the influence of media has been linked to negative health outcomes, such as smoking, obesity, risky sexual behaviors, eating disorders, poor body image, anxiety, and violence. The Center concludes

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[3] The Court has long recognized a Constitutional right to bear and raise children in accordance with one's beliefs. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[4] Center on Media and Child Health at Children's Hospital, Harvard Medical School, and Harvard School of Public Health, available at: www.cmch.tv/mentors_parents/messaging.asp (last accessed Sept. 5, 2009).

that "content matters—all media are educational." *Id.* Others observe the connection between media and early sexualization:

> The problem is that the sexualized childhood is harming young children at the time when the foundations for later sexual behavior and relationships are being laid.... They are forced to deal with sexual issues when they are too young, when the way they think leaves them vulnerable to soaking up the messages that surround them with few resources to resist.

DIANE E. LEVIN, PH.D. and JEAN KILBOURNE, ED.D, SO SEXY SO SOON: THE NEW SEXUALIZED CHILDHOOD AND WHAT PARENTS CAN DO TO PROTECT THEIR KIDS, 63-64 (Ballantine Books, N.Y. 2008).

Eileen Zurbriggen, the chair of the American Psychological Association's Task Force on the Sexualization of Girls, reports, "The consequences of the sexualization of girls in media today are very real and are likely to be a negative influence on girls' healthy development. We have ample evidence to conclude that sexualization has negative effects in a variety of domains, including cognitive functioning, physical and mental health, and healthy sexual development." EILEEN ZURBRIGGEN, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS (Washington, D.C. 2007).

In addition to scientific studies, the Supreme Court has recently pointed out that common sense alone establishes that indecency is harmful to children:

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.... Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate.... Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.

FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1813 (2009).

C. Broadcast Bandwidth Continues to Grow More Scarce.

It has been proposed that "technological advances have eviscerated the factual assumptions underlying" *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U. S. 367 (1969) and *Pacifica*. *Fox v. FCC*, 129 S. Ct. at 1821 (Thomas, J., concurring). In particular, the claim is made that "[b]roadcast spectrum is significantly less scarce than it was 40 years ago." *Id.* That statement is highly debatable.

While it is correct that scientific advances have made us more efficient users of electromagnetic spectrum, the demand for spectrum has grown exponentially in the past twenty years as the need for mobile, wireless Internet use has exploded. Spectrum that is most desirable is that with a frequency under 3 GHz. In particular, devices using these frequencies receive signals through an antenna, not a dish, which greatly assists mobility and convenience. The tremendous demand for spectrum is revealed by the enormous prices that have been raised in FCC auctions in the past decade. For example, spectrum in the 700 MHz bands brought in $19.6 billion dollars at an auction in March 2008. Brad Reed, "FCC Hauls in $19.6 Billion for 700 MHz Auction," *Network World* (Mar. 19, 2008).

Federal Communications Commission Chairman Julius Genachowski has argued recently that there is likely to be a "35X increase in mobile broadband traffic over the next 5 years." *Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, FCC Spectrum Summit*, "Unleashing America's Invisible Infrastructure," Washington, D.C. (Oct. 21, 2010) at 3. Chairman Genachowski estimates that "around 300 additional megahertz of spectrum [will be needed] by 2014 to accommodate this growing demand." *Id.* at 4. The FCC estimates that the value of that spectrum could be "as high as $120 billion." *Id.*

In fact, obtaining additional spectrum for wireless broadband is so critical to America's wireless economy that Chairman Genachowski has made a number of proposals. In one of them

"current spectrum licensees, such as TV broadcasters, could voluntarily relinquish spectrum; the FCC would then auction spectrum for flexible wireless broadband, and some portion of the proceeds would be shared with the old licensee." *Id.* at 6. *Amici* make no comment on the wisdom of this proposal, but we note that it undermines the factual basis for the proposition that spectrum is not a scarce resource. At present, spectrum is finite and costly, and it is so valuable that the FCC is willing to attempt to cannibalize the holdings of powerful groups like broadcasters to acquire more of it for wireless use.

II. THE FCC'S CURRENT INDECENCY REGIME DOES NOT VIOLATE THE FIRST OR FIFTH AMENDMENTS BECAUSE IT IS NOT IMPERMISSIBLY VAGUE AND DOES NOT HAVE AN IMPERMISSIBLE CHILLING EFFECT.

A primary concern regarding speech restrictions that are vague or substantially overbroad is that the regulations will have a "chilling effect" on otherwise protected speech. *Amici* contend that the FCC's current indecency regime is neither impermissibly vague nor substantially overbroad and thus cannot be said to have a chilling effect on protected speech.

Nonetheless, Respondents contend that the current indecency regime has changed substantially, and exerts a chilling effect on protected speech. In looking at changes in the FCC's enforcement approach, we see that 1) the Commission now believes that even "fleeting expletives" can constitute indecency and be subject to regulation, and 2) that in

enforcing the ban on indecent expletives, it takes a context-based approach.

It is not the intent of *Amici* to take lightly the concerns over the potential for chilled expression caused by vague regulations or to minimize the importance of preventing substantially overbroad regulations from having a chilling effect on speech. The FCC's current regulatory regime offends neither doctrine because 1) it is no more vague than the previous regime that was upheld in *Pacifica*; 2) the potential "chilling effect" under the FCC's current enforcement regime is no greater than under the previous policy; 3) a context-based approach is necessary to determine indecency; 4) it provides a safe harbor; and 5) it poses no greater chill than the ban on obscenity.

A. The FCC's Current Enforcement Policy is Not Unconstitutionally Vague Because It Provides Clear Notice to Broadcasters Regarding What Content is Indecent.

The FCC's indecency regime does not violate the Fifth Amendment because it is not impermissibly vague. In 2001, the FCC published a policy statement to provide guidance as to its enforcement policies with respect to broadcast indecency. It established two fundamental aspects for indecency findings. First, material "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R.

7999, 8002 ¶ 7 (2001) ("2001 Industry Guidance"). Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002, ¶ 8.

The policy statement further explained that the determination of whether a broadcast is "patently offensive" turns on the "full context" in which the material is broadcast and is "highly fact-specific." *Id.* at 8002-8003 ¶ 9 (emphasis omitted). It identifies three factors which guide the analysis of whether content is patently offensive:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length description of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, [and] whether the material appears to have been presented for its shock value.

Id. at 8003 ¶ 10 (emphasis omitted).

These factors are sufficiently precise to put broadcasters on notice as to what material is unacceptable for broadcasting between the hours of 6 a.m. and 10 p.m. Although the Commission had not regulated fleeting expletives prior to the issuance of the 2004 Guidance, it is reasonable to believe that the 2001 Guidance could apply to fleeting expletives. Certain words, such as the "f-word" and "s-word" have an inherently sexual or excretory connotation. Even when used as an intensifier, as the singer Bono did during the 2003 Golden Globe awards, the "f-word" and similar words are used as intensifiers

precisely because they connote sexual or excretory activity. *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes" Awards Program*, 16 F.C.C.R. 8003 ¶ 8 (2004) ("2004 Guidance").

Due to the inherently sexual or excretory nature of certain words, broadcasters are on notice that those words are presumptively patently offensive. *See Fox Television Stations, Inc., v. FCC*, 613 F.3d 317, 331–32 (2nd Cir. 2010). Instead of banning these words outright, however, the FCC examines the words in context, as required by the Court in *Pacifica*, 438 U.S. at 750.

The Second Circuit is misguided in holding that forbidding fleeting expletives "[bears] no rational connection to the Commission's actual policy," because the FCC "[has] not instituted a blanket ban on expletives," 613 F.3d at 324, *quoting Fox Television Stations, Inc.*, v. FCC, 489 F.3d 444, 458 (2nd Cir. 2007). The FCC allows broadcasters more leeway by using a context-based approach rather than banning all expletives. Broadcasters are on notice that these words are presumptively patently offensive. If the FCC were to ban all utterances of these words, regardless of context, broadcasters would likely complain that the policy made no exception for content with harsh language that was possessed of extraordinary merit. Short of eliminating all restrictions on broadcasting, it is difficult to see how the FCC can better balance broadcasters' interest in knowing what material is permissible and the public's interest in maintaining decency in broadcasting. And as this Court has noted, "perfect clarity and precise guidance have never been required even of regulations that restrict

expressive activity." *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2719 (2010), quoting *United States v. Williams*, 553 U.S. 285, 304 (2008) (quoting *Ward v Rock Against Racism*, 491 U.S. 781, 794 (1989)).

Likewise, the FCC's guidelines provide sufficient guidance to broadcasters regarding nudity that is considered patently offensive. The second factor in the FCC's 2001 Guidance is "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities." *2001 Guidance* at 8003 ¶ 10. Despite respondents' attempts to argue otherwise, buttocks and breasts can be considered sexual or excretory organs, if only because the naked public display of these body parts is usually considered an affront to decency. Additionally, although respondents argue that the nudity is brief, even they do not argue that it can be characterized as "fleeting." Respondents admit that the camera repeatedly returns to the actress's naked buttocks and breasts. Response in Opposition to Petition for Writ of Certiorari at 8–9.

The character's nudity is the point of the entire scene. Were the point of the scene only to show the difficulties that ensue when a parent becomes involved with a new romantic partner, it would have been easy to do so by implying the character's nudity rather than dwelling on it. Alternatively, CBS could have shown the offending episode during the safe harbor period, away from the eyes of impressionable children.

The Court's decision in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) supports the FCC's enforcement policy. In declining to apply *Pacifica* to the Communications Decency Act, the

Court noted that there were significant differences between the two cases. In *Pacifica*, unlike in *Reno*, the medium at issue had long been subject to regulation. Additionally, the objectionable radio broadcast "represented a rather dramatic departure from traditional program content," and was not categorically prohibited, but restricted to certain airtimes. *Reno*, 521 U.S. at 867.

Like radio broadcasting, and unlike Internet content, television broadcasting has long been subject to regulation. Also like radio broadcasting, and unlike Internet content, television content can be confined to hours when children are unlikely to be in the audience.

Furthermore, like the Carlin broadcast, the objectionable content contained in the Golden Globes and NYPD Blue broadcasts represented a sharp departure from broadcasting norms. Were this not the case, surely respondents would have provided examples of the numerous other uses of the "f-word," "s-word," and sustained shots of nude buttocks and breasts. Such examples are conspicuous by their absence.

B. The Potential "Chilling Effect" Under the FCC's Current Enforcement Regime is No Greater than that Under the Previous Policy, which has Already Passed Constitutional Muster in *Pacifica*.

In *Pacifica*, this Court upheld the FCC indecency regime then being used to enforce 18 U.S.C. § 1464 (1976 ed.) which prohibited "any obscene, indecent or profane language by means of radio

communications" and determined not only that the "Filthy Words" monologue of George Carlin was "indecent," but that the FCC's regulation of such speech on the airwaves was in no way unconstitutional. Following the Court's opinion in *Pacifica*, the FCC reported that it would not attempt to promote an expansive interpretation of the indecency concept. *See, e.g., In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (1978) ("We intend strictly to observe the narrowness of the *Pacifica* holding.") In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question.

Much has been made of the fact that in *Pacifica* indecent words were used repeatedly, whereas in the broadcasts that are the subject of this action they were used once or twice. To support their argument that the *Pacifica* Court did not intend to institute a ban on "fleeting expletives," Respondents point to the following language:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which *context is all-important. The concept requires consideration of a host of variables.*

Pacifica, 438 U.S. at 750 (emphasis added).

Respondents would have us believe the Court would have looked unfavorably on a ban of "fleeting expletives" and that the regulation was upheld only because Mr. Carlin's offense was so egregious. This could not be further from the truth, as shown by the further statement from the Court:

> To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Id. at 749-749.

In fact, it was not the Court that approved "fleeting expletives." On the contrary, it was the FCC which, in the years immediately following *Pacifica*, merely wished not to pursue claims that didn't reach the levels it deemed sufficiently egregious. "Repetitious use of Carlin's 'seven dirty words' effectively became the FCC's yardstick for 'indecency.'" *Action for Children's Television v. FCC*, 852 F.2d. 1332, 1336 (D.C. Cir. 1988).

Permitting "fleeting expletives" is akin to giving broadcasters "one free bite" at indecency. However, for a young child viewing "family programming" in prime time, indecent language is still indecent, whether it is said once or repeated ad infinitum.

C. A Context-based Approach to Determining Indecency Will Not Chill Constitutionally Protected Speech.

Respondents argue that the FCC's current indecency regime chills protected speech because it has evolved from the policy in place in the years immediately following *Pacifica*, and because the determination of indecency is based on the context in which words are uttered and whether it is offensive by contemporary community standards.

Far from rendering the current enforcement regime vague, and therefore causing a chilling effect on speech, the determination of context is absolutely necessary to determining indecency. *See Pacifica*, 438 U.S. at 750. As noted above, the FCC's policies are not new; in 2001, the FCC published a policy statement to provide guidance as to its enforcement policies with respect to broadcast indecency. As the FCC moved to a stricter regulation of indecency, no longer requiring repetitious use of the "seven filthy words," it realized that context was important, and gave adequate guidance to assist broadcasters in determining whether content was suitable or whether it would be considered indecent.

D. The Potential "Chilling Effect" is Mitigated by a "Safe Harbor" for Broadcasts between 10:00 p.m. and 6:00 a.m.

This is not the first time the FCC has modified its enforcement standards. After a decade of refusing to take action unless material involved

repeated use, for shock value, of words similar to or identical to those satirized in the Carlin "Filthy Words" monologue, the FCC developed a generic definition of indecency which was addressed by the Court of Appeals for the D.C. Circuit in 1988. The court upheld the generic definition of indecency, which is not dissimilar to the definition currently in use, but noted the important position of the "safe harbor" in preventing the possibility of a chilling effect on speech:

> Facing the uncertainty generated by a less than precise definition of indecency plus the lack of a safe harbor for the broadcast of (possibly) indecent material, broadcasters surely would be more likely to avoid such programming altogether than would be the case were one area of uncertainty eliminated. We conclude that ... the FCC must afford broadcasters *clear notice of reasonably determined times* at which indecent material safely may be aired.

Action for Children's Television, 852 F.2d at 1342-1343 (emphasis supplied).

Since that case, there has been a clearly delineated "safe harbor" between the hours of 10:00 p.m. and 6:00 a.m., when "indecent" broadcasting is allowed. It is reasoned that this allows sufficient time for adults to view indecent content, while simultaneously limiting its intake by young children.

If broadcasters are concerned that certain content may be considered indecent in the FCC's context-based approach, they are not prevented from airing it during the "safe harbor" time periods. This

mitigates any claim of a "chilling effect" on speech that would otherwise be protected.

E. Any Potential "Chilling Effect" of the Indecency Regulations is No Greater than that Imposed by Regulation of Obscenity.

Unlike indecent speech, which is allowed between 10:00 p.m. and 6:00 a.m., when children are unlikely to hear or view it, obscene speech is never allowed in broadcast media and is not given First Amendment protection. While the federal obscenity statute does not expressly define obscenity, this Court has devised a three-part test to identify obscenity in *Miller v. California*:

> (a) Whether "the average person, applying contemporary community standards" would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [or federal] law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. 15, 24 (1973) (internal citations omitted).

Since its inception the *Miller* test has been attacked as vague and ambiguous, and anti-obscenity laws have been targeted as having a "chilling effect" on protected speech. The *Miller* Court itself acknowledged "[t]hat there may be marginal cases in which it is difficult to determine

the side of the line on which a particular fact situation falls" but that this "is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Id.* at 27, n.10 (quoting *United States v. Petrillo*, 332 U.S. 1, 7 (1947)). The Court further stated, "If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of ... Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile...." *Id.*

This Court, and the lower courts, have repeatedly refused to strike down obscenity laws, even while acknowledging the potential chilling effect on protected speech. "While laws such as the one at issue indeed may chill the expression of protected speech in certain instances, such secondary effects seem unavoidable if the federal anti-obscenity statute is to be enforced." *Eckstein v. Melson*, 18 F.3d 1181, 1187 (4th Cir. 1994).

As in *Miller* and later cases relying on its standard, the Court in *Pacifica* did not strike down the FCC's regulation merely because of the possibility that it would chill protected speech. *Pacifica*, 438 U.S. at 743. As shown above, the FCC has done all in its power to avoid the possibility of chilling protected speech. Its current enforcement regime is no more vague than that regime addressed in *Pacifica*, and as required by that case, it takes a context-based approach in defining indecency. Furthermore, it provides a "safe harbor" between 10:00 p.m. and 6:00 a.m. Thus, Respondents cannot be heard to complain that the FCC's regulatory regime for indecency "chills" their legitimate expression.

III. Strict Scrutiny Is Inapplicable to Review of Indecency Restrictions on Broadcasting.

Strict scrutiny is not applicable to the review of indecency restrictions on broadcasting for several reasons. First, as the Court noted in *Pacifica* (declining to apply strict scrutiny to the FCC's regulations), patently offensive language, while perhaps subject to First Amendment protection, "surely lies at the periphery of *First Amendment* concern" and "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context." *Pacifica*, 438 U.S. at 743, 747 (emphasis supplied). There remain ample outlets for patently offensive sexual and excretory language, even within the broadcast context. Broadcasters are permitted to air such material during the "safe harbor" period from 10 p.m. to 6 a.m., for a total of fifty-six hours per week. *Amici* simply contend that the hours of 6 a.m. to 10 p.m., when children are likely to be in the audience, are not appropriate contexts for broadcasting patently offensive sexual and excretory language.

Secondly, strict scrutiny does not apply in the broadcast context. The Court recently applied strict scrutiny to a state statute prohibiting the sale or rental of violent video games to minors. *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). However, there are significant differences between the sale or rental of video games and broadcasting. The most important difference pertains to the uniquely pervasive nature of broadcasting. *See Pacifica*, 438 U.S. at 748.

Broadcasting enters the home of every person with a television set. In contrast, a person must take affirmative steps to buy or rent a video game. The only way to prevent broadcast television from entering the home is not to have a television at all—and that, indeed, reduces adults to viewing what is only fit for children. The second difference lies in the likelihood of harm to children. The Court recognized in *Pacifica* that society has an interest in protecting children from exposure to indecent material. *Pacifica*, 438 U.S. at 749–50. Children's access to video games is limited by their ability to visit stores or afford the games. Parents have a greater ability to restrict their children's access to games by refusing to purchase gaming consoles or the games themselves. In contrast, a preschool child can easily turn on the television while a parent is in another room. For these reasons, the FCC's indecency regulations in no way resemble the restriction on speech at the source that was subjected to strict scrutiny in *Brown*.

IV. THE LIMITATIONS ALLOWED ON BROADCAST SPEECH ARE GROUNDED IN CONSTITUTIONAL PRINCIPLES THAT HEARKEN BACK TO AMERICA'S FOUNDING.

We are cognizant of that fact that at least one member of this Court has argued that the more limited protections afforded broadcast speech for decades "lack[] any basis in the Constitution." *Fox v. FCC*, 129 S. Ct. at 1821 (Thomas, J., concurring). However, while *Amici* are similarly concerned about any possible deep intrusion into First Amendment rights, we believe that the more limited protections

afforded broadcast speech by *Pacifica* are well-grounded in original constitutional principles.

These principles recognized that government may legitimately take steps to reduce the likelihood that children will be exposed to harmful materials. As has been expressed recently, "[t]he Framers could not possibly have understood 'the freedom of speech' to include an unqualified right to speak to minors." *Brown v. Entertainment Merchants Assn.*, 131 S. Ct. at 2759 (Thomas, J., dissenting). Additionally, the Founders "would not have understood 'the freedom of speech' to include a right to speak to children without going through their parents." *Id.*

As this court observed in *Pacifica* "[w]e have long recognized that each medium of expression presents special First Amendment problems." *Pacifica*, 438 U.S. at 748 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503). The Court proceeded to remark that "broadcast media have established a uniquely pervasive presence in the lives of all Americans." *Id.* at 748. While some have claimed that the emergence of new media has undermined *Pacifica's* observation about broadcasting's penetration of the American home, in fact, Petitioners have demonstrated convincingly that broadcast TV and radio still maintain "a uniquely pervasive presence" in American life. Petitioners' Brief at 44-46.

That deep presence links to the second argument presented in *Pacifica* justifying the limits Congress has allowed for broadcast speech. That is, "broadcasting is uniquely accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 749. Echoing the founding constitutional principles supporting parental protection of children, noted

above, the *Pacifica* court stated that bookstores and movie theaters "may be prohibited from making *indecent* material available to children." *Id.* at 749 (emphasis added). The Court pointed out that previously it had held "that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." *Id.*, citing *Ginsberg v. New York*, 390 U.S. at 640 and 639.

Therefore, the limitations allowed on broadcast speech are actually grounded in constitutional principles hearkening back to America's founding. They recognize that each communications media presents its own set of considerations as to how it may affect children. Some have virtually no impact; some, like broadcasting, may have a powerful effect on children. Accordingly, "legislature[s] [can] properly conclude that parents and others, teachers for example, who have... primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Brown*, 131 S. Ct. at 2760 (quoting *Ginsberg*, 390 U.S. at 639). Therefore, it is constitutionally permissible that regulations like those promulgated by the Commission in this instance should be able to restrict profanity and nudity during certain hours of the day when children are more likely to be listening or watching unattended by their parents.

CONCLUSION

For the foregoing reasons, *Amici* pray that this Honorable Court reverse the judgment of the court

below and declare that the FCC's current broadcast indecency enforcement regime is constitutional.

Respectfully submitted,

J. Robert Flores, Esq. (*Counsel of Record*)
HAMPTON ROAD STRATEGIES, LLC.
10410 Hampton Road
Fairfax Station, VA 22039
Tel.: 703-609-8731
Fax: 703-425-5018

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1293

In The

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR *AMICI CURIAE* FORMER FCC OFFICIALS IN SUPPORT OF RESPONDENTS

MARK FOWLER
JERALD FRITZ
HENRY GELLER
GLEN O. ROBINSON
KENNETH G. ROBINSON, JR.
NEWTON N. MINOW

TIMOTHY K. LEWIS
Counsel of Record
CARL A. SOLANO
NANCY WINKELMAN
MARIEKE T. BECK-COON
SCHNADER HARRISON
SEGAL & LEWIS LLP
1600 Market St., Suite 3600
Philadelphia, PA 19103
(215) 751-2000
tlewis@schnader.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. THE FCC'S EVOLVING STANDARDS OF INDECENCY	5
II. THE FCC'S CURRENT REGIME AND JUSTICE BRENNAN'S WARNING	12
III. *PACIFICA'S* OBSOLESCENCE	19
A. Singling Out Broadcasters	20
B. Burning the House to Roast the Pig	28
IV. *VOX POPULI* AND THE POLITICS OF INDECENCY REGULATION	34
CONCLUSION	37

TABLE OF AUTHORITIES

Page

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ACLU v. Ashcroft,
542 U.S. 656 (2004) 6, 29, 31

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478 F. Supp. 2d 775 (E.D. Pa. 2007),
aff'd sub nom. ACLU v. Mukasey,
534 F.3d 181 (3d Cir. 2008) 29

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516 U.S. 1072 (1996) 9

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59 F.3d 1249 (D.C. Cir. 1995) 8

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535 U.S. 234 (2002) 28

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478 U.S. 714 (1986) 36

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131 S. Ct. 2729 (2011) 18, 26, 27, 31, 33

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352 U.S. 380 (1957) 28, 29, 36

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(3d Cir. Nov. 2, 2011) 11

TABLE OF AUTHORITIES – Continued

Page

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130 S. Ct. 876 (2010) 27, 28, 38

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512 U.S. 43 (1994) 26

Denver Area Educ. Telecomm. Consortium, Inc. v. FCC,
518 U.S. 727 (1996) 20

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129 S. Ct. 1800 (2009) 14

FCC v. Pacifica Found.,
438 U.S. 726 (1978) ..... *passim*

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613 F.3d 317 (2d Cir. 2010) 14, 15, 19, 20, 31

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413 U.S. 15 (1973) 5

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129 S. Ct. 808 (2009) 28

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395 U.S. 367 (1968) 21

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521 U.S. 844 (1997) 19, 21, 28, 33

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529 U.S. 803 (2000) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

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Page

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Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd 4975 (2004).....11, 13, 35

Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program "Without a Trace," 21 FCC Rcd 2732 (2006).....12

Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue," 23 FCC Rcd 1596 (2008).....15

Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue," 23 FCC Rcd 3147 (2008).....35

TABLE OF AUTHORITIES – Continued

Page

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Page

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INTEREST OF *AMICI CURIAE*

Amici are former commissioners and officials of the Federal Communications Commission ("FCC" or "Commission") who oppose its indecency enforcement policy.[1] We are a bipartisan group with different views about some issues of radio and television regulation, but we are of one view on the issue now before this Court: the discriminatory and arbitrary enforcement of controls on indecent broadcast speech violates the First Amendment.

Mark Fowler, currently a wireless radio project investor and entrepreneur, was Chairman of the FCC from 1981 to 1987. Jerald Fritz, Sr. Vice President and General Counsel for Allbritton Communications Company, served as Legal Advisor and Chief of Staff to FCC Chairman Mark Fowler from 1981 to 1987. Henry Geller, retired, served as General Counsel of the FCC from 1964 to 1970, as special assistant to the Chairman in 1970, and was Administrator of the National Telecommunications and Information Administration from 1978 to 1981. Newton N. Minow, Senior Counsel at Sidley & Austin, LLP, was Chairman

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[1] Pursuant to Supreme Court Rule 37.6. *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* or their counsel contributed monetarily to the preparation and submission of this brief.

Petitioners and respondents have filed blanket consent letters with the Court as to the submission of *amicus* briefs in this case. The parties' blanket consent letters are on file with the Clerk of Court.

of the FCC from 1961 to 1963. Glen O. Robinson, the David A. and Mary Harrison Distinguished Professor of Law Emeritus at the University of Virginia, was FCC Commissioner from 1974 to 1976. Kenneth G. Robinson, a Washington, D.C. communications attorney, was Senior Legal Advisor to FCC Chairman Alfred Sikes from 1989 to 1993, as well as senior policy advisor to five Assistant Secretaries of Commerce for Communications and Information.

As former FCC commissioners and officials, *amici* have been personally associated with the indecency controversy in the past, and we once had some sympathy for the FCC's concerns. Indeed, one of us joined in the Commission's original *Pacifica* decision, and a second participated in an earlier decision that partly anticipated *Pacifica*. However, the FCC's enforcement policies have destroyed any expectations we had for moderation and restraint in this endeavor and have caused us to regret our earlier involvement in it. *Amici* have previously filed briefs in this Court and in the Second Circuit urging that this out-of-control regime of program control be declared unconstitutional.[2]

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[2] Former FCC Chairman and Commissioner James Quello participated in our earlier brief in this Court; he has since passed away.

SUMMARY OF THE ARGUMENT

After several times up and down the appellate ladder, this Court is now squarely presented with the question whether the FCC's current indecency enforcement regime violates the First Amendment. Thirty-three years ago, the Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), guardedly approved the restriction of "indecent" broadcast programming. Today, the Commission's arbitrary and excessive enforcement policies have exceeded anything contemplated by the Court in *Pacifica* and should be struck down.

The FCC's policy towards broadcast indecency has evolved from a restrained effort to regulate clear, flagrant instances of indecent language by a handful of broadcast licensees and performers into an ever-expanding campaign against ordinary radio and television programming. In pursuit of a policy of protecting children against exposure to offensive language, the Commission has embarked on an enforcement program that has all the earmarks of a Victorian crusade. To effectuate its new clean-up-the-airwaves policy, the Commission has radically expanded the definition of indecency beyond its original conception; magnified the penalties for even minor, ephemeral images or objectionable language; and targeted respected television programs, movies, and even non-commercial documentaries.

The Commission's actions in this case are but a few of several recent actions taken by the Commission

that exceed the boundaries it originally set and that were assumed by this Court in the *Pacifica* decision. The Commission purports to be able to discern whether language or images are indecent by looking at the "context" in which they appear. However, the banner of "context" masks subjective and arbitrary value judgments. With no discernable standards to the Commission's *ad hoc* enforcement regime, broadcasters inevitably steer far clear of the margins, taking with them much constitutionally-protected expression. By its vagueness, the Commission's policy casts an intolerably overbroad net by First Amendment standards.

In today's media environment, the distinctions drawn by *Pacifica* between broadcast and other electronic media are unsustainable. Viewers can access the same content across broadcast, cable, satellite, and the internet or can subvert the Commission's enforcement efforts by simply switching channels or turning on a computer. This reality makes plain that the Commission's efforts to impose a separate standard on broadcasters is woefully underinclusive. The First Amendment cannot tolerate discrimination against one of several like speakers. It is time for this Court to declare that the same First Amendment principles apply to all media.

As former officials of the Commission, we understand very well the political and popular pressures it faces. However, it is an elementary principle of American democracy that such pressures must be constrained by the Constitution. The Commission has no

warrant to subordinate fundamental First Amendment principles to the censorial demands of public moralists or their political representatives.

ARGUMENT

I. THE FCC'S EVOLVING STANDARDS OF INDECENCY

Until its 1975 decision in *Citizen's Complaint against Pacifica Foundation Station WBAI(FM)*, 56 F.C.C.2d 94 (1975), the Commission interpreted 18 U.S.C. § 1464 as an obscenity statute, governed by the constitutional definition and constraints of the Supreme Court's obscenity jurisprudence. The statutory proscription of "indecent or profane" language was treated as synonymous with obscenity. Although some of the pre-1975 cases might have been debatable candidates for the application of the obscenity standard announced in *Miller v. California*, 413 U.S. 15 (1973), they had never forced the Commission to consider a different standard under the rubric of indecency or profanity.

Pacifica was different: George Carlin's monologue on the seven words that "you couldn't say on the public, ah, airwaves," clearly did not satisfy the first prong of *Miller's* definition of obscenity, requiring that the material "appeals primarily to the prurient interest." 413 U.S. at 24. Confronted on the one hand with a choice of declaring Carlin's monologue to be obscene and inviting certain reversal in court, and on

the other hand dismissing the complaint as *damnum absque injuria*, the Commission proceeded to invent a third option, which was to give independent significance to "indecency" but prescribe a different scope for its regulation than that applied to obscenity. *Pacifica*, 56 F.C.C.2d at 97. Traditionally, obscenity has been treated as unprotected speech and, as such, is subject to total suppression.[3] In contrast, the FCC's approach to indecent speech called for a kind of time-and-place regulation; the time being the period when children were likely to be in the audience (subsequently fixed between the hours of 6 a.m. and 10 p.m.), the place being radio and television broadcasts. *Id.* at 99.

The Commission's move was novel, and even radical in light of established jurisprudence, but it was at least limited in scope. Except where it qualified as obscenity, indecent language was generally confined to that describing "sexual or excretory activities and organs" in a manner that was "patently offensive" as measured by contemporary community standards for the broadcast medium, at times of day when there is a reasonable risk that children may be in the audience. *Id.* at 97-98. The Commission made clear that it was concerned only with "clear-cut, flagrant cases" and emphasized "that it would be inequitable to hold a licensee responsible for indecent

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[3] *ACLU v. Ashcroft*, 542 U.S. 656 (2004), suggests that obscenity is no longer completely beyond the pale of First Amendment protection, but that question is not in issue here.

language" when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Petition for Reconsideration of a Citizen's Complaint against Pacifica Found. Station WBAI(FM)*, 59 F.C.C.2d 892, 893 n.1 (1976). This announced policy of restraint was critical to how this Court viewed the new doctrine when it affirmed the Commission in 1978. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). As Justice Powell noted in a concurring opinion, "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 761 n.4.

And it did. Immediately after the Supreme Court affirmed its authority to regulate, the Commission rejected a petition by Morality in Media to deny a license renewal for one of the foremost educational stations in the country on the ground that it had consistently broadcast "offensive, vulgar and otherwise harmful material to children." *WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978). The Commission held that the Court's decision "affords this commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding." *Id.* at 1254. To underscore the point, then-Chairman Charles Ferris announced that another case like *Pacifica* was "about as likely to occur again as Halley's Comet." Charles D. Ferris, Chairman, FCC, Address before the New England Broad. Assoc. (July 21, 1978).

Paint Ferris the optimist, Halley's Comet turned out to be the wrong benchmark; the Comet makes a periodic appearance about every 76 years, but indecency returned to the FCC in just nine. In 1987, the FCC was drawn back into the indecency issue by the appearance of "shock radio" that was designed to push the limits of provocative programming beyond what Carlin had attempted a decade earlier. Despite the broadcasts' deliberately provocative character, the Commission responded with restraint. It revised its post-*Pacifica* view that the enforcement policy was limited to the precise seven words of Carlin's famous monologue and reinstated the original "generic" policy instead. The Court of Appeals for the District of Columbia affirmed the Commission's generic policy, albeit not without reservation and with an admonition to the Commission to proceed cautiously. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Echoing Justice Powell in his *Pacifica* concurrence, the court pointedly noted its assumption that "the potential chilling effect of the FCC's generic definition will be tempered by the Commission's restrained enforcement policy." *Id.* at 1340 n.14.

The decision was to be the first act of a three-ACT play in which the Commission, Congress, and the court of appeals took turns exploring the permissible limits of the new indecency regime.[4] We will not

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[4] There was a fourth *ACT* case, but it dealt only with a constitutional and statutory challenge to the procedures for enforcing 18 U.S.C. § 1464. *Action for Children's Television v.*

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examine the plot in detail except to observe that in the course of the play three things were firmly established. *First*, the proscription on indecency was limited to certain hours; the First Amendment forbids a 24-hour ban.[5] *Second*, the Commission was required to apply the indecency restrictions on a consistent basis and was barred from discriminating against commercially sponsored programs or stations.[6] *Third*, the court was seriously concerned about the risk that the regulation of indecency could get out of hand. Its repeated references to the need for caution in defining and enforcing the restrictions, reversal of Congress's attempt to make the restrictions absolute, and insistence on a consistent and principled policy make clear that the court was alert to the dangers that a policy of reining in a small number of broadcast provocateurs could easily become a vehicle for an unconstitutional morals crusade against the entire industry.

In the aftermath of the *ACT* cases, the Commission continued to view indecency as a problem of controlling a small number of rogue broadcasters and

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FCC, 59 F.3d 1249 (D.C. Cir. 1995). The court rejected the challenges.

[5] In the second "act," *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), the court struck down Congress's attempt in 1989 to eliminate the indecency "safe harbor."

[6] *See Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (affirming the ban on indecency between the hours of 6 a.m. and 10 p.m. for all stations; reversing the use of broader period, 6 a.m. to 12 a.m., for commercial stations).

broadcast personalities like Howard Stern, whose syndicated talk show was responsible for a very large percentage of all fines paid for indecent broadcasting over the past score years.[7] In 2001, the Commission issued a set of guidelines on its indecency policy, but the guidelines did not announce any new policy. *See Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd 7999 (2001).

Yet, the time was not far off when things would change – radically. In 2004 the Commission embarked on what then-Chairman Michael Powell described as the "most aggressive enforcement regime in decades." *See Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcomm. on Telecomms. and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. 87, at 79 (2004). He could have more precisely said the most aggressive enforcement regime *ever*. Not only did the Commission find more violations and impose more penalties in that one year than in the entire prior history of the indecency doctrine,[8] it greatly expanded

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[7] In 1995, for example, Infinity Broadcasting paid a then-record sum of $1.7 million to settle indecency complaints over a series of Howard Stern Shows. Paul Fahri, *Stern 'Indecency' Case Settled; After 7-Year Fight With FCC, Broadcasting Firm to Pay $1.7 Million*, WASH. POST, Sept. 2, 1995, at F1.

[8] In 2004, the FCC assessed nearly $8 million in proposed fines and settlements, compared to $440,000 a year earlier. Between 1993 and 2006, 2004 was the high water mark for

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the scope of what constituted indecency, as, for example, in its extraordinary and unprecedented ruling in the Golden Globe Awards decision that a single, spontaneous exclamation – "Fucking brilliant" – by Bono upon receiving the award was indecent. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004) ("*Golden Globe*").[9] To magnify the impact still further, the Commission decided that each utterance of a forbidden word may be counted as a separate violation, instead of looking at a particular program as a single, integrated unit. *See Clear Channel Broad. Licenses, Inc.*, 19 FCC Rcd 6773 (2004).

The Commission's new campaign also moved beyond the traditional targets for indecency enforcement. With a few exceptions, those traditional targets were radio talk shows that deliberately and repeatedly followed a pattern of provocative programming. In its new phase, however, the Commission has undertaken

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annual collection. *See Indecency Complaints and NALs*: 1993-2006, FCC, http://www.fcc.gov/eb/oip/ComplStatChart.pdf.

[9] The Commission's decision in *Golden Globe* to punish fleeting expletives and images was such a dramatic departure from its previous enforcement policy that the U.S. Court of Appeals for the Third Circuit recently held an attempt to fine CBS for airing a fleeting image of Janet Jackson's breast during the 2004 Super Bowl Halftime Show – which occurred *prior* to *Golden Globe* – to be arbitrary and capricious under the Administrative Procedure Act. *CBS Corp. v. FCC*, No. 06-3575, slip op. at 18 (3d Cir. Nov. 2, 2011).

a close inspection of movies, regular television series, live events, and even educational documentaries, to locate objectionable language or images. Even critically honored television programs like "Without a Trace" and "NYPD Blue" have become targets of indecency patrols. *See Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program "Without a Trace,"* 21 FCC Rcd 2732 (2006) (finding violation and proposing forfeiture of $32,000 for each CBS owned or affiliated station carrying the program); *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd 2664, 2696-98 (2006) (finding violation but imposing no forfeiture for "NYPD Blue" program) ("*Omnibus Order*").[10]

II. THE FCC'S CURRENT REGIME AND JUSTICE BRENNAN'S WARNING

The orders now before the Court exemplify the character of the Commission's radically expansionist indecency regime. The Commission has traveled far afield of *Pacifica's* narrow confines to embrace an *ad hoc* approach with a broad and unpredictable nature

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[10] The Commission's remand decision in the *Omnibus Order* dismissed the complaints against "NYPD Blue" on a procedural ground; however, this dismissal does not alter the substance of its earlier finding that the program contained indecent and profane language. *See Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd 13299, 13328-29 (2006) ("*Omnibus Remand Order*").

that chills vast swaths of speech protected by the First Amendment. The First Amendment will not tolerate such a vague and overbroad exercise of authority.

Under the new enforcement regime, indecency can mean as little as the casual use of an expletive. For example, in the *Omnibus Order* the Commission found that the documentary, "The Blues: Godfathers and Sons," broadcast by a non-commercial educational station, was indecent because of the use of the F-word or S-word by some of the artists interviewed. 21 FCC Rcd at 2684-85. The Commission held that "any use of [the F-word] or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." *Id.* at 2684 (quoting *Golden Globe*, 19 FCC Rcd at 4978). It went on to say that the S-word similarly "has an inherently excretory connotation." *Id.*

However, the Commission's attempt to classify certain words as "inherently" sexual or excretory is utterly perplexing when viewed alongside its treatment of other words.[11] According to the Commission,

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[11] The Commission's "inherency doctrine" is also preposterously out of touch with the way language is used and understood today. It may be that Twila Tanner (in a live interview) describing a fellow contestant on "Survivor: Vanuatu" as a "bullshitter" was vulgar. *Omnibus Order*, 21 FCC Rcd at 2698-2700. However, only a silly literalist would think that she was describing an excretory function. As Justice Stevens aptly observed in his dissenting opinion in the Court's 2009 *Fox* decision, "As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the

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it is indecent to call someone a "bullshitter," *id.* at 2698-2700, but it is all right to call him an "ass," *id.* at 2712, or even a "dickhead," *id.* at 2696. You may never say "fuck 'em" – even in an off-handed way, *id.* at 2690-92 – but it is at least sometimes okay to say "up yours" with all deliberate intensity, *id.* at 2712.

The Commission justifies its unpredictable enforcement policy by professing to consider offending language or images in "context." Under this approach, the Commission may determine an expletive is indecent in one context, but is "integral" to a work's artistic value in another. *See Omnibus Remand Order*, 21 FCC Rcd at 13327. As the U.S. Court of Appeals for the Second Circuit aptly noted below, this standardless approach begets uncomfortable results, such as the disparate treatment of the film "Saving Private Ryan" and the documentary, "The Blues." *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 333 (2d Cir. 2010). The words "fuck" and "shit" were deemed integral to the "realism and immediacy" of a film about combat in World War II, but indecent in the context of artists interviewed on the history of blues music. *Compare Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film*

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resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1827 (2009).

"Saving Private Ryan," 20 FCC Rcd 4507, 4513 (2005), *with Omnibus Order*, 21 FCC Rcd at 2684-85. Though the Second Circuit saw "no reason to suspect that the FCC is using its indecency policy as a means of suppressing particular points of view[,]" the policy's vulnerability to discriminatory enforcement and subjective value judgments was clear. *Fox*, 613 F.3d at 332-33.

The Commission's contextual approach applies with equal force to its treatment of images. With almost no explanation, the Commission declared that seven seconds of a woman's buttocks and a brief view of the side of her breast while she prepares for a shower constitutes an "explicit," "graphic," "shocking," and "titillating" depiction of sexual organs. *See Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue,"* 23 FCC Rcd 1596, 1598-1600 (2008). At the same time, the Commission defends its judgment that the full frontal nudity of concentration camp prisoners in the film "Schindler's List" is not indecent by simply stating that ABC could not "reasonably" expect the two to be treated alike. Pet'r's Br. 32. The Commission's terse explanation ignores the fact that, though the two contexts are indeed very different, they give no guidance or standards for networks to follow in the future. Pointing to "context" is not an explanation in itself. It leads to a subjective agency judgment whether material in one program is artistically permissible (*e.g.*, Private Ryan; Schindler) and material in others is titillating and thus gratuitous

(*e.g.*, Blues; NYPD Blue). With such subjective censorship, the FCC becomes the national nanny of who gets an artistic pass and who does not. Indeed, it is impossible to predict whether the landmark miniseries "Roots," premiered by ABC in 1977 and based on Alex Haley's famous saga on slavery, could be broadcast today; the series opens with scenes featuring topless female African villagers.

The Commission's reliance on "context" as an all-encompassing justification flies in the face of *Pacifica's* use of the concept. Context was a *limiting* principle for the *Pacifica* Court. It has now become a tool, not for curtailing the reach of the Commission's indecency regime, but for expanding it. The *Pacifica* plurality invoked the concept of context to distinguish Carlin's monologue from circumstances in which similar language would be protected by the First Amendment. 438 U.S. at 746-47. The plurality determined that the "Dirty Words" of Carlin's monologue lacked constitutional protection in the unique context at bar: the intentionally provocative repetition of profanities over a twelve minute period during a daytime broadcast. In his concurrence, Justice Powell rejected the idea that that Court could generally opine on the value of speech, but joined the judgment on the understanding that the Commission would confine itself to punishing only the sort of "verbal shock treatment" that Carlin's monologue inflicted. *Id.* at 757, 761 & n.4.

It was Justice Brennan, in his prescient dissent, who foresaw how his colleague's assertedly narrow

opinion could be exploited. He highlighted the pathway leading directly to the panoptical policy we see today. He noted that the Court's two justifications for limiting First Amendment protection – the intrusive nature of radio and the presence of children in the listening audience – imported no natural limitation to potential censorship:

> These two asserted justifications are . . . plagued by a common failing: the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions constituting the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive. Taken to their logical extreme, these rationales would support the cleansing of public radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays . . . ; they could support the suppression of a good deal of political speech . . . ; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.

Id. at 771-72 (Brennan, J., dissenting).

Justice Brennan observed that the plurality and concurrence were prepared to "take the FCC at its word" that the agency recognized the *limited factual*

context of tolerable enforcement, but did not share their faith himself. *Id.* at 769, 771. As Justice Brennan feared, the Commission has now taken the *Pacifica* rationales "to their logical extreme" and turned a unique context – a factual outlier – into a malleable justification meaning, in effect, "regardless of context." *Id.* at 770-71.

The lack of standards and *ad hoc* enforcement of the Commission's indecency policy leaves broadcasters with no compass and little to do but try to avoid fines by steering far clear of potentially objectionable programming. This Court has repeatedly recognized that the First Amendment will not tolerate such overbroad and chilling regulation. As recently as last term, the Court emphasized that even legitimate government aims, when burdening First Amendment rights, "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741-42 (2011). Addressing a state ban on the sale of violent video games to minors, the Court in *Brown* highlighted the danger of government-imposed morality in finding the law overinclusive: "While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want." *Id.* at 2741 (emphasis in original). Similarly here, the Commission's indecency policy has become a vehicle for imposing its own value judgments on broadcasters and viewers. The inevitable result is that broadcasters censor themselves in an attempt to predict what

those values will be. It is time for the Court to heed Justice Brennan's advice: "I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs . . . in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand." *Pacifica*, 438 U.S. at 772. (Brennan, J., dissenting).

III. *PACIFICA'S* OBSOLESCENCE

From the beginning, the sole source of the constitutional authority to regulate indecency has been this Court's decision in *Pacifica*. As the Second Circuit noted, post-*Pacifica* courts have applied "something akin to intermediate scrutiny" to the Commission's indecency regime. *Fox*, 613 F.3d at 326. The orders now before the Court serve to underscore how differently broadcast media is treated from cable and internet, which receive strict scrutiny. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997). At the same time, modern technology has collapsed the traditional distinctions between media on which *Pacifica* relied to treat broadcasting in a separate class. This singular treatment of broadcasting is woefully underinclusive when viewed alongside readily-accessible content available through other media. *Pacifica* should be overruled and the artificial and discriminatory isolation of broadcast media lifted. If afforded full First Amendment protection, it is clear the Commission's indecency policy cannot pass constitutional muster.

A. Singling Out Broadcasters

The factors relied on by *Pacifica* to treat broadcast media as unique were that broadcasting was considered to be a "uniquely pervasive presence in the lives of Americans" and "uniquely accessible to children." *Pacifica*, 438 U.S. at 748-59. The Second Circuit expressed skepticism that these distinctions are still valid today. *See Fox*, 613 F.3d at 326 ("The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus."). That skepticism is well grounded. In 2006, about 86% of television households received their television programs from cable or satellite (classified by the Commission as "multichannel video program distributors" or "MVPD"). *Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming*, 24 FCC Rcd 542, 546 (2009). In January 2010, the Nielsen Company reported that 9% of homes with televisions relied only on broadcast service, and the number has been steadily decreasing year-to-year. Television Audience 2009, Nielsen, http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/04/TVA_2009-for-Wire.pdf. In an environment where the vast majority of TV-watching homes access channels not subject to the Commission's indecency regime directly alongside those that are, it makes no sense whatsoever to continue to regard broadcast programs as "*uniquely* pervasive" or "*uniquely* accessible to children." *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996) (Breyer, J.) (plurality)

(finding the pervasiveness factors cited in *Pacifica* applicable to cable television).[12]

In the internet age, the same observation holds true for online viewing. This Court, refusing to apply *Pacifica* to the internet, treated it as qualitatively different from broadcast media in *Reno v. ACLU*, 521 U.S. 844 (1997).[13] However, the Court in *Reno* would have needed a crystal ball to predict the changes to come over the next fourteen years in the content available on the internet and its pervasive presence in the lives of American adults and children. Today,

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[12] In light of the broadcasting-is-different mantra, it bears emphasizing here that the foremost technological feature that has been thought to make broadcasting different from other media – the use of scarce spectrum – was not part of the indecency doctrine. *See Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., dissenting) (noting that both the majority opinion by Justice Stevens and the concurring opinion by Justice Powell "rightly refrain from relying on the notion of 'spectrum scarcity' to support their result"). The public trustee rationale of *Red Lion Bctg. Co. v. FCC*, 395 U.S. 367 (1968), is thus not involved here.

[13] Among other things, the Court in *Reno* reasoned that the internet, unlike broadcasting, is not "invasive" and does not "appear on one's computer screen unbidden." 521 U.S. at 849. This idea that broadcasting is invasive is a curious one, conjuring the image of hapless captives of the TV screen who are unable to defend themselves even with a remote control that can change channels faster than a speeding bullet. Be that as it may, it no longer makes sense to distinguish between broadcasting and cable on this basis. Yet in *Playboy*, 529 U.S. 803, the Court held that cable content controls were unconstitutional absent a showing that it was the least restrictive means of accomplishing the objective of protecting children. No consideration was given to the invasiveness/surprise element.

the walls have all but collapsed between media with regard to what, when, and where programming content is available, as evidenced by the steadily increasing popularity of streaming internet video. *See Implementation of the Child Safe Viewing Act; Examination of Parental Control Techs. for Video or Audio Programming*, 24 FCC Rcd 11413, 11471-73 (2009) ("*Congressional Report*") (discussing expansive availability of video on the internet). In 1997, it might have been plausible to suppose that children would not stumble upon offensive language or images online because most users searched for discrete content. In today's era, the element of surprise is as likely for streaming online video as it is for broadcast video. The reality is the internet is becoming an alternative platform for viewing programs that are seen on conventional TV, as Hulu illustrates. *See* Hulu Home Page, http://www.hulu.com/. Hulu (a joint venture of NBC, Fox, and ABC, with some additional outside investment) offers commercially supported streaming video of regular TV shows and movies from broadcast networks and other sources (including a number of cable networks). Except for the smaller screen size of the display terminal there is no important difference between watching an episode of "House" on conventional TV and watching it as a video stream on the internet. Of course, any broadcast-based programs that appear on Hulu are subject to indecency controls *if* they are *broadcast* during the hours of 6 a.m. to 10 p.m. But a program that was broadcast during the safe harbor period is available on Hulu any time, with no restrictions on content.

In terms of access, "[t]he typical home of 2.6 people has an average of 24 gadgets, including at least one smartphone – double the number 15 years ago. . . ." Cecilia Kang, *Number of cellphones exceeds U.S. population: CTIA trade group*, WASH. POST, Post Tech, Oct. 11, 2011, http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gIQARNcEcL_blog.html. The advent of smartphones and other internet-accessible mobile gadgets increasingly makes the content the FCC attempts to suppress available anytime, anywhere.

The internet has likewise rendered it absurd to treat radio broadcasting as a unique medium for First Amendment purposes. Thousands of radio stations that are subject to the Commission's indecency regime while broadcast over the airwaves are also available as streaming radio or podcasts over the internet, where *Pacifica* has no application. *See Streaming Radio Guide*, http://www.streamingradioguide.com/. In 2006, an estimated 12% of Americans had listened to internet radio within the past week – a 50% increase over the previous year – and one in five had listened within the past month. Bill Rose & Larry Rosin, *The Infinite Dial: Radio's Digital Platforms* 4-5 (Arbitron Inc./Edison Media Research 2006), http://www.arbitron.com/downloads/digital_radio_study.pdf.

The Commission argues that because so much of the available network content *originates* as broadcast programming, it can achieve much of its purpose by

simply regulating the broadcast end of the distribution pipeline. This short-sighted argument will prove at best a temporary and increasingly futile means of achieving the Commission's aims, forcing false distortions between programming delivered to broadcast channels and that available on the internet. The rapid proliferation of web-only series makes this likelihood clear. Hulu already lists "Web Originals" as its own genre of programming, offering a number of series that can be accessed with a single click. *See* Hulu, http://www.hulu.com/genres/Web. Recently, producer/filmmaker McG launched the web series "Aim High" for Warner Bros. Digital Distribution, allowing viewers to interact with the show through social media. Michelle Kung, *McG Hopes "Aim High" Will Redefine Social Viewing*, WALL STREET JOURNAL, Speakeasy, Oct. 18, 2011, http://blogs.wsj.com/speakeasy/2011/10/18/mcg-hopes-aim-high-will-redefine-social-viewing/. In internet radio, podcasts (downloadable program-oriented online audio files) are available to provide web-only content to a growing audience. *See* Rose, *The Infinite Dial*, at 2, 9.

In all events, it simply defies common sense to assume that cleansing the broadcast airwaves of material deemed indecent by the Commission curtails children's access to the same material through other media. Some of the same programs the Commission has labeled indecent when broadcast can be seen on YouTube. Indeed, because they are archived, they can be seen and seen again. No one knows how many children saw the 2003 Golden Globe award show

when Bono exclaimed the F-word on receiving the award. But it is a fair guess that a larger number will see it on YouTube, where it has been archived since 2007.[14] *See* Video of Bono's Acceptance Speech at the Golden Globes, YouTube.com, http://www.youtube.com/watch?v=COlPQlNguvU.

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[14] According to a report by the Joan Ganz Cooney Center at Sesame Workshop:

> More children use the Internet regularly and for longer periods of time than ever before. Most children who go online do so a few times a week, and unsurprisingly, usage increases with age. Among very young children (0 to 5) who use the Internet, about 80% do so at least once a week. At age 3, about one-quarter of children go online daily, increasing to about half by age 5. And by age 8, more than two-thirds use the Internet on any given weekday. Children ages 5 to 9 average about 28 minutes online daily. In 2009, the oldest children in our review (8 to 10) spent about 46 minutes on a computer every day . . . This is more than double the amount of time 8-to-10-year olds spent online in 2006 (19 minutes).

A.L. Gutnick et al., *Always connected: The new digital media habits of young children* 16 (Sesame Workshop and the Joan Ganz Cooney Center 2011), http://joanganzcooneycenter.org/upload_kits/jgcc_alwaysconnected.pdf.

Though young children still spend much more media time with TV (encompassing both cable and broadcast) than the internet, *see id.*, the key point is that even very young children go online regularly and the number is increasing. To be clear, the suggestion is not that children go online in order to access indecent program content (just as they do not normally turn on the TV to do so). Rather, the critical point is that the reasons for treating the media differently can no longer hold water in the modern media environment.

The fact that there is nothing "unique" about broadcast programming content makes clear that the Commission's efforts to apply its indecency policy are painfully underinclusive. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles") (emphasis in original). With a click of the remote control or by turning on a computer, viewers turn effortlessly between media subject to vastly different standards of First Amendment review. This underinclusiveness raises two important concerns: First, an underinclusive regulation undermines the purpose of the restraint, without which there can be no excuse for the restriction of speech. Second, a regulation that is underinclusive by applying to one speaker, but not other like speakers, discriminates against the censored speaker. The Court recently underscored both of these points in *Brown*. The Court noted that, although California banned the sale of violent video games to minors, it failed to ban other avenues of delivering violent images shown to have the same effect on children, such as "cartoons starring Bugs Bunny or the Road Runner" or video games like "Sonic the Hedgehog" rated as appropriate for all ages. *Brown*, 131 S. Ct. at 2739. Justice Scalia reasoned:

> The consequence is that [California's] regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about

> whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

Id. at 2740; *see also Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others").

The Commission replicates here the precise issues that troubled the *Brown* Court. It attempts to cleanse one medium of speech deemed indecent while other media with like content escape similar scrutiny. It is of no moment that the Commission's inability to enforce its indecency regime against cable and the internet derives from a lack of authority to do so. The result is the same: broadcasters are disfavored among media for no persuasive reason.

It is simply incoherent and discriminatory to have multiple First Amendments for different electronic media used to deliver the same basic words and images to the end consumer. *Pacifica* must be overruled and the same strict scrutiny applied to broadcast media as is applied to cable and the internet. As *Citizens United* very recently emphasized:

> [A]ny effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those

> differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.

130 S. Ct. at 890. The Court in *Citizens United* itself overruled precedent that was only ten years old, emphasizing that *stare decisis* principles must yield where "experience has pointed up the precedent's shortcomings." *Id.* at 912 (quoting *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009)). "Rapid changes in technology – and the creative dynamic inherent in the concept of free expression – counsel against upholding a law that restricts political speech in certain media or by certain speakers." *Id.* at 912-13.

B. Burning the House to Roast the Pig

If the Commission's indecency policy receives the strict scrutiny it is due, it clearly cannot pass constitutional muster consistent with the Court's treatment of other media. Even assuming the legitimacy of the Commission's underlying concerns about the impact of profanity or provocative images on children, the First Amendment requires the least restrictive means to be employed to address them. The Court has repeatedly held that the government cannot "reduce the adult population . . . to reading [or seeing] only what is fit for children." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (quoting *Butler v. Michigan*, 352 U.S. 380, 381 (1957) and citing *Playboy*, 529 U.S. at 814; *Reno*, 521 U.S. at 875; and *Sable Communications v. FCC*, 492 U.S. 115, 130-31

(1989)). To do so is – as Justice Brennan put it in his *Pacifica* dissent – "to burn the house to roast the pig." *Pacifica*, 438 U.S. at 766 (quoting *Butler*, 352 U.S. at 383).

Addressing cable programming in *Playboy*, 529 U.S. at 826, the Court held that the government must show the absence of effective alternative private means of controlling offensive content before imposing government controls. In *ACLU v. Ashcroft*, 542 U.S. 656, 670 (2004), the Court upheld a preliminary injunction against enforcement of the Child Online Protection Act, 47 U.S.C. § 231(a)(1), on the ground that blocking and filtering technology appeared to provide an effective and less restrictive alternative to direct government control.[15] Indeed, the availability of blocking technology was the "key difference between cable television and the broadcasting media" identified by the *Playboy* Court in distinguishing *Pacifica*:

> The option to block [unwanted channels] reduces the likelihood, so concerning the Court in *Pacifica*, . . . that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem . . . *Simply put, targeted blocking is less restrictive than banning, and the*

[15] The Court remanded for further hearings on the question whether available filtering technology was an effective and less restrictive alternative. On remand the lower court confirmed that it was. *See ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008).

> *Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.*

Playboy, 529 U.S. at 815 (emphasis added).[16]

Equivalent technology is available for television broadcasting, such as the V-chip device.[17] As the Second Circuit noted:

> Every television, 13 inches or larger, sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on a standardized rating system . . . Moreover, since June 11, 2009, when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip . . . In short, there now exists a way to block programs that contain indecent speech [or images] in a way that was not possible in 1978.

---

[16] Note that the "ban" referred to in *Playboy* was in fact an analogous restriction to the safe harbor hours applicable to broadcasters. The legislation at issue in *Playboy* required cable television operators to block channels "primarily dedicated to sexually-oriented programming" except between the hours of 10 p.m. and 6 a.m. 529 U.S. at 806.

[17] Admittedly, an equivalent to the V-chip does not currently exist for radio broadcasting. However, the Commission's post-2004 enforcement regime has increasingly focused on television and the absence of a radio equivalent does not detract from the V-chip as an effective, less restrictive alternative allowing parents to control a child's television programming access.

Fox, 613 F.3d at 326. As a simple and effective means of filtering broadcast television, parental control provides a viable means of screening indecent content that is effectively indistinguishable from private controls previously approved by the Court.

It is no objection to the viability of the V-chip that it is not widely used or understood by parents, as the Commission argues. As the Court emphasized in *ACLU v. Ashcroft*, it is not actual use but the *availability* of individualized filtering devices that makes them a less restrictive alternative. 542 U.S. at 669-70. The Government does not have a compelling interest in doing what informed and empowered parents can do for themselves in protecting children. *Playboy*, 529 U.S. at 526. As the Commission itself noted in a 2009 Congressional Report, "The limited number of parents who have used the V-chip find it beneficial." *Congressional Report*, 24 FCC Rcd at 11422; *see also id.* at 11424 (studies indicate that parents who use the broadcast, cable, and movie rating system for television content find it useful). That parents have access to the tools they need should be the end of the inquiry. Whether they are used is a personal choice, not one for the government. *See Brown*, 131 S. Ct. at 2741 (it is not narrow tailoring to legislate, not based on what parents actually want, "but what the State thinks parents *ought* to want") (emphasis in original).

The Commission can and should engage in public education and cooperate with media providers to improve awareness of the V-chip and other parental

controls. Empowering parents to make informed choices is a useful and appropriate role for the government. The Commission acknowledges this in its Congressional Report, where it discusses a number of avenues of planned study to increase awareness and usage of the V-chip, such as improvements to the industry rating system, providing instructional inserts with TV purchases, and encouraging manufacturers to offer a V-chip button on remote controls. *See Congressional Report*, 24 FCC Rcd at 11423, 11435. In reality, many parents do not use the V-chip because they "use other kinds of parental control tools and parenting strategies to monitor and guide their children's media use . . . including setting rules about when children can use media and what channels they can watch, keeping the TV and/or computer in a public space in the home, or blocking TV channels through their cable service." *Id.* at 11422-23. Across all media, however, commentators favored "greater education and media literacy for parents and more effective diffusion of information about the tools available to them." *Id.* at 11414. It is through education and encouraging industry innovation that the Commission can best help parents monitor a child's media intake without severely burdening the First Amendment rights of broadcasters and viewers who want to receive screened content.

It is also no argument against the V-chip to highlight its imperfections. The Commission asserts the V-chip is not a substitute for indecency enforcement because it may not catch unexpected content or

because programs may be inaccurately rated. Pet'r's Br. 49-51. However, this Court has already rejected the argument against imperfect parental controls. Though the Court in *Brown* acknowledged that the voluntary video game rating system at issue was imperfect and some minors would still purchase violent video games, the Court nonetheless concluded: "Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest." 131 S. Ct. at 2741. "[S]ome gap in compliance is unavoidable." *Id.* at 2741 n.9. The Court in *Playboy* similarly refused to discount blocking technology because it "may not go perfectly every time," recognizing that "[a] court should not assume a plausible, less restrictive alternative would be ineffective." 529 U.S. at 824. Indeed, the Court in *Reno* was heavily influenced by the prospect of better parental controls for internet-users *in the future* in concluding the government failed to explain why a less restrictive alternative like parental controls was not as effective as a ban on delivering indecent content to minors over the internet. 521 U.S. at 877, 879; *see also Congressional Report*, 24 FCC Rcd at 11424-35 (discussing potential improvements to make the V-chip more effective).

Moreover, the Commission's complaints about the V-chip's imperfections belie the assumption that its current indecency policy will do a better job. As a practical matter, the only way to assure a perfect result is to employ precisely the means the post-2004 Commission has embraced: cast a wide net and scare

off so much speech that "accidents" simply do not arise. Again, the Commission's demand for perfection seeks to "burn the house to roast the pig."

Parental controls empower individuals by allowing them to tailor their children's programming according to *the parent's* idea of what is appropriate while avoiding a burden on the rights of viewers who wish to receive the restricted content. The Commission's indecency controls do not empower parents; they merely empower the government – along with a handful of activist morality groups – to assume the parental role on their behalf.

IV. *VOX POPULI* AND THE POLITICS OF INDECENCY REGULATION

The Commission's post-2004 indecency enforcement regime is, to a certain extent, a product of popular pressures. The Commission certainly cannot ignore the concerns and complaints of viewers, political groups, and Congress. However, the Commission's enforcement actions make it appear that there has been some rampant growth in broadcast indecency, and indeed a casual inspection of the number of recorded public complaints might suggest as much. The number of complaints is misleading, however, and the Commission's reference in the *Omnibus Order*, 21 FCC Rcd at 2665, to "hundreds of thousands of complaints between February 2002 and March 2005" is completely disingenuous. The Commission is fully aware that the overwhelming percentage of recent

complaints target a handful of programs, and most of them are computer-generated electronic complaints provided by activist groups such as the Parents Television Council. In some cases, the Commission's complaint count has even included duplicate complaints from the same person to different commissioners and staff as separate complaints. To further underscore the artificiality of the complaint process, the Commission ruled that it will act on complaints even if the complainant does not claim to have watched or heard the program. *Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue,"* 23 FCC Rcd 3147, 3156 (2008). The Commission's complaints policy has become so artificial that it naturally prompts the question, why does the Commission not simply turn the monitoring function over to the Parent's Television Council? The answer is simple: it already has.

Adding to the influence of activist crusaders like the Parents Television Council, the Commission has also been influenced by congressional pressure. In 2003 and 2004, the Senate and House adopted resolutions that not only declared the FCC should be more vigorous in its enforcement of indecency but should specifically overrule its enforcement bureau's finding of no violation in *Golden Globe*. S. Res. 283, 108th Cong. (2003); H.R. Res. 500, 108th Cong. (2004). The FCC responded, both in *Golden Globe* and here. Shortly thereafter, Congress reaffirmed its desire for tougher enforcement by enacting the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235,

§ 2, 120 Stat. 491 (2006), amending 47 U.S.C. § 503(b), to authorize increased forfeiture penalties by an order of magnitude $32,500 to $325,000. The decimal point movement is a powerful motivator.

Of course, we expect agencies to respect congressional directives, but the agency must still conform its actions to the rule of law. Since Congress cannot direct how the law should be enforced, *see Bowsher v. Synar*, 478 U.S. 714 (1986), the Commission is owed no deference for being responsive to Congress's wishes or directives on that score. And quite apart from separation of powers principles, the First Amendment allows no deference to Congress or the FCC on matters implicating direct regulation of speech content. *Sable*, 492 U.S. at 129.

If political pressure from Congress does not justify the Commission's enforcement actions, neither does the clamor of public groups. In fact, the louder the clamor, the greater the need for First Amendment protection. It would be an impoverished First Amendment indeed that accommodated every public agitation for laws designed to suppress free speech in the name of protecting the morals of young people. *See, e.g., Butler*, 352 U.S. at 381 (rejecting ban of material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth"); *see also Playboy*, 529 U.S. at 253 (when the government acts to protect children, it must do so "in a way consistent with First Amendment principles").

CONCLUSION

In 1983, Ithiel de Sola Pool, a distinguished political scientist and student of communications law, described *Pacifica* as a "legal time bomb" that would explode into "radical censorship." ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 134 (1983). Indecency regulation was then in its infancy, and the Commission's enforcement policy in the immediate aftermath of *Pacifica* seemed to render such predictions hyperbole. As it happened, Professor Pool was prescient, in ways that those of us who were involved in indecency regulation in its infancy did not appreciate at the time. This case is merely one example of what Pool predicted.

The indecency doctrine this Court approved in *Pacifica* has become an intolerable threat to free speech. The court below concluded with the observation that perhaps the Commission could craft an indecency doctrine that would pass constitutional muster – despite its conspicuous failure to do so. However, we see no hope of reviving the doctrine that the Court saw before it in *Pacifica*.

For one thing, technology has destroyed any basis for censorial controls aimed only at broadcasting. Broadcasting is no longer unique, and it is time for the Court to bring its views of the electronic media into alignment with contemporary technological and social reality.

For another, the history of its enforcement shows the practical impossibility of containing it within

acceptable boundaries. What began as a limited tool for reining in a small number of provocative broadcast personalities and irresponsible licensees has become a rallying cry for a revival of Nineteenth Century Comstockery. Mindful of this enforcement history the court below did not limit its decision to "fleeting expletives." This Court should not do so either. It should overturn *Pacifica* as an ill-considered, but in any case obsolescent, precedent, adherence to which puts the Court on a future course "that is sure error." *Citizens United*, 130 S. Ct. at 912.

Respectfully submitted,

MARK FOWLER
JERALD FRITZ
HENRY GELLER
GLEN O. ROBINSON
KENNETH G. ROBINSON, JR.
NEWTON N. MINOW

TIMOTHY K. LEWIS
Counsel of Record
CARL A. SOLANO
NANCY WINKELMAN
MARIEKE T. BECK-COON
SCHNADER HARRISON
SEGAL & LEWIS LLP
1600 Market St., Suite 3600
Philadelphia, PA 19103
(215) 751-2000
tlewis@schnader.com

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AMICUS CURIAE BRIEF

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Petitioners,

—v.—

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Petitioners,

—v.—

ABC, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONERS

PATRICK A. TRUEMAN
Counsel of Record
ROBERT W. PETERS
Co-Counsel
MORALITY IN MEDIA, INC.
475 Riverside Drive
New York, New York 10115
(212) 870-3222
p.trueman@verizon.net

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17

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 5

I. THE FCC'S BROADCAST INDECENCY ENFORCEMENT POLICY IS NOT UNCONSTITUTIONALLY VAGUE 5

II. IT ISN'T JUST BROADCASTERS WHO MUST USE COMMONSENSE WHEN ASSESSING OFFENSIVE REFERENCES TO SEXUAL ORGANS & ACTIVITIES 13

III. BROADCASTERS WHO HAVE IGNORED CONCERNS ABOUT PROGRAMMING SHOULD NOT BE HEARD TO COMPLAIN ABOUT THE FCC'S INDECENCY POLICY 16

IV. THE FCC'S CURRENT POLICY ON CONTENT WITH 'SERIOUS VALUE' DOES NOT VIOLATE THE FIRST AMENDMENT 22

V. THE FCC'S CURRENT POLICY ON 'FLEETING EXPLETIVES' DOES NOT VIOLATE THE FIRST AMENDMENT 26

VI. 'STRICT SCRUTINY' IS NOT THE APPROPRIATE STANDARD FOR REVIEW OF BROADCAST REGULATION 31

CONCLUSION 35

TABLE OF AUTHORITIES

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Action for Children's TV v. FCC,
852 F.2d 1332 (D.C. Cir. 1988) 11, 22

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478 U.S. 675 (1986) 5, 28

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STATUTES

Communications Act of 1934 5

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INTEREST OF AMICUS CURIAE[1]

Morality in Media, Inc. ("MIM") as *amicus curiae*, files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.

MIM is a New York nonprofit corporation organized in 1962 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. MIM has an interest in this case because it is concerned about the breakdown of standards of decency in the mainstream entertainment media and because this case will in significant measure determine whether or how the FCC goes about regulating broadcast indecency.

MIM has filed friend of the court briefs in this Court involving various First Amendment issues, including: *FCC v. Fox TV Stations*, 129 S. Ct. 1800 (2009) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); and in *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment*

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus* has made a monetary contribution to the preparation or submission of this brief.

for the Arts v. Finley, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *U.S. v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *City of L.A. v. Alameda Books, Inc. and Highland Books, Inc.*, 535 U.S. 425 (2002); *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002) and 542 U.S. 656 (2004); and *U.S. v. Williams*, 553 U.S. 285 (2008).

Amicus is filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

When Congress enacted the Radio Act of 1927 and the Communications Act of 1934, it did not define "indecent." Broadcasters were presumed to know what is meant by "decency." In response to Court decisions, the FCC later defined "indecent," clarified the definition and provided a "safe harbor" for indecency. Courts have repeatedly held that the FCC definition (also used in other laws) is not unconstitutionally vague. That possible stiff fines for violations of the law may deter some lawful conduct is not a reason to invalidate it.

If the inability to define *indecent* with "ultimate, god-like precision" means that the FCC can no longer regulate indecency, then depictions of "hard-core" sexual conduct can be shown on

broadcast TV because not all depictions of "hard-core" sex are obscene under the *Miller* test.

If *precision* is constitutionally required with respect to enforcement of the broadcast indecency law, it should also be required with respect to claims of sexual harassment involving a "hostile work environment." The latter concept is anything but *precise;* but employers, *including broadcasters,* must still determining what is or isn't acceptable *workplace* behavior. Broadcasters should also be responsible for determining what is "indecent."

Despite their protestations, the problem is not that the broadcast TV networks can no longer discern contemporary community standards. *The problem is that they long ago stopped caring much about these standards.* Decades ago, the networks adhered to a voluntary industry code that reflected community standards. Later, they had standards departments that kept programming somewhat in check. Today, they push the envelope and then complain they don't know whether the FCC will deem this or that violation of community standards actionable. If the networks were genuinely concerned about standards, there are steps they can now take to remedy the current situation.

Serious value is an important variable that the FCC considers when determining whether content violates the indecency law. It has rightly rejected the notion that if a work has merit, it is per se not indecent. If a broadcaster disagrees with an FCC ruling involving content with alleged "serious value," the appropriate remedy would be to

appeal that determination. The Supreme Court has stated that a determination about serious value is "particularly amenable to appellate review."

When Congress enacted the Radio Act of 1927, it did not give broadcasters a right to use the public airwaves to curse at least once. Perhaps it would be unwise to roll back the clock and to insist that when Congress said "*any* obscene, indecent or profane language," it meant what it said. It would also be unwise to determine that broadcasters have a right to utter at least one expletive, regardless of circumstances. There is a "middle road" between prohibiting all expletives and allowing at least one – namely, when utterance of one or more expletives amounts to a nuisance, it is actionable.

The Court below questioned whether the broadcast media are still "uniquely pervasive and uniquely accessible to children" and indicated that "strict scrutiny" should apply when evaluating challenges to the indecency law. *Amicus* contends that it was not broadcasting's "uniqueness" *per se* that justified its special treatment in 1978 but rather that unlike any other form of media then in existence, broadcasting had become pervasive and readily accessible to children. It is still pervasive and readily accessible to children *and government still has a necessary protective role to play.*

ARGUMENT

I. THE FCC'S BROADCAST INDECENCY ENFORCEMENT POLICY IS NOT UNCONSTITUTIONALLY VAGUE

In an early obscenity case, *Rosen v. United States*, 161 U.S. 29, 42 (1896), Petitioner asked the trial court to instruct the jury that he should be acquitted if he entertained a reasonable doubt about whether the publication referred to in the indictment was obscene, to which the Supreme Court replied, in part:

> Everyone who uses the mails of the United States for carrying...publications *must take notice of what, in this enlightened age, is meant by decency*... in social life, and what must be deemed obscene... [*Italics* added]

When Congress enacted the Radio Act of 1927 and the Communications Act of 1934, it apparently thought that broadcasters must also "take notice of what is...meant by decency," because while both Acts included a provision making it unlawful to "utter any obscene, indecent, or profane language by means of radio," neither Act defined the term "indecent." Nor did Congress define "indecent" when it enacted 18 USC 1464, making it a crime to broadcast "indecent" language.

As this Court observed in *Bethel School District v. Fraser*, 478 U.S. 675, 681-682 (1986), there is also a prohibition on use of "indecent language" in the House of Representatives, "where

some of the most vigorous political debates in our society are carried on." This prohibition remains in effect; and until this day the House has not felt constrained to provide a definition of "indecent."

Nevertheless, Nicholas Johnson, dissenting in *Eastern Educ. Radio (WUHY-FM)*, 24 FCC 2d 408, at 422, 424 (1970), criticized the FCC for ignoring: "decades of First Amendment law carefully fashioned by the Supreme Court into the recognized concepts of 'vagueness'...I believe it is our responsibility to adopt *precise*...guidelines...to follow in this murky area." [*Italics* added]

In *Citizen's Complaint Against Pacifica Foundation Station WBAI*, 56 FCC 2d 94, 99 (1975), the FCC acted to "clarify the standards which the Commission utilizes to judge indecent language," stating in part (at 98):

> [T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offense as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience... When the number of children in the audience is reduced to a minimum...a different standard might...be used. The definition...would remain the same... However, we would also consider whether the material has serious...value...

In *FCC v. Pacifica*, 438 U.S. 726, 731 (1978), this Court did not address the contention made in the lower court that 18 USC 1464 is vague but did observe that the FCC intended to "clarify the standards" it utilized in considering complaints about indecent speech on the airwaves.

In *In re Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd. 930, at 931-932 (1987), the FCC provided further clarification of its indecency definition:

> "Patently offensive" is a phrase that must, of necessity, be construed with reference to specific facts. We cannot and will not attempt to provide petitioners with comprehensive index or thesaurus of indecent words or pictorial depictions that will be considered patently offensive... We note...that the phrase "patently offensive" is also used in the obscenity context and that the courts insist on construing that phrase with reference to specific facts...The fact that its meaning can only be given greater specificity on a case-by-case basis does not make the term "patently offensive" unconstitutionally vague in the indecency context any more than it does in the obscenity context...Broadcasters may not reasonably expect to relieve themselves of this legal obligation by demanding that we exercise their editorial judgment for them.

In concluding that the obscenity test was not unconstitutionally vague, the Court in *Miller v. California*, 413 U.S. 15, 27 (1973) stated in part:

> If the inability to define regulated materials with ultimate, god-like precision altogether removes the power...to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby...[2]

The *Miller* Court also stated (*id.*, at 26, n.9): "The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged..."

In *Action for Children's TV v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995), *cert. den.*, 516 U.S. 1043 (1996), the D.C. Circuit stated:

> [W]e dismiss petitioners' vagueness challenge as meritless. The FCC's definition of indecency in the new regulations is identical to the one at issue in *ACT II*, where we stated that "the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [Commission's] definition" as did our holding in *ACT I*... Petitioners fail to provide any convincing reasons why we should ignore this precedent.

In *Dial Inform. Services v. Thornburgh*, 938 F.2d 1535, 1540 (2nd Cir. 1991), *cert. den.*, 502 U.S.

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[2] And if the FCC's inability to define *indecent* with "ultimate, god-like precision" means that it can no longer regulate broadcast indecency, then "hard-core" sexual conduct can also be shown on broadcast TV during the family hour because not all depictions of "hard-core" sexual conduct are obscene under the three part *Miller* obscenity test.

1072 (1992), the 2nd Circuit held that "indecent" as used in 47 USC 223(b)(2) had been "defined clearly" by the FCC and was not unconstitutionally vague.

In *Denver Area Educational Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996), this Court also rejected a vagueness challenge to 47 USC 532(h), which includes language patterned after the FCC's definition of "indecent" for broadcasting.

Respondent Fox TV Stations states (*Brief in Opposition*, at 7) that in *Reno v. ACLU*, 521 U.S. 844 (1997) "this Court confronted a vagueness challenge to a prohibition substantially identical to the FCC's generic definition of indecency" and affirmed the judgment that the prohibition was "unconstitutionally vague." The *Reno* Court, however, also stated the following:

> [T]he Government argues that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue. [*Id.*, at 864]
>
> [T]he CDA is a criminal statute...[T]his increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil

> regulation reviewed in *Denver Area Ed. Telecomm. Consortium...* [*Id.*, at 871-872])

In *Village of Hoffman Estates v. The Flipside, Hoffman Estates*, Inc., 455 U.S. 489, 498-499 (1982), the Court also stated:

> The degree of vagueness that the Constitution tolerates...depends in part on the nature of the enactment...Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by...resort to an administrative process...[3]

Following *Reno*, the FCC also issued a *Policy Statement* to provide licensees with "guidance" regarding its case law and enforcement policies with respect to broadcast indecency.[4] While there are significant differences between the three "principal factors"[5] set forth in the *Policy Statement* and the three prongs of the *Miller v. California* obscenity test,[6] there are also parallels. The first factor is similar to the "patently offensive sexual conduct" prong of the *Miller* test; the second

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[3] See, e.g., *Citizen's complaint against Pacifica Foundation Station*, 56 FCC 2d, at 99 ("There are several reasons why we are issuing a declaratory order... A declaratory order is a flexible procedural device admirably suited to...clarify the standards which the Commission utilizes to judge 'indecent language.' If not satisfied by the Commission's action on reconsideration, judicial review may be sought...").

[4] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999 (2001).

[5] *Id.*, at 8003.

[6] *Miller*, 413 U.S. at 24.

factor is similar to the "appeal to the prurient interest" prong of the *Miller* test; the third factor is similar to the "lacking in serious value" prong of the *Miller* test. To some extent, therefore, these "principal factors" alleviate vagueness concerns expressed in *Reno* (521 U.S. at 872-873):

> The Government argues that the statute is no more vague than the obscenity standard this Court established in *Miller v. California*... The Government's reasoning is also flawed. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague...Each of *Miller's* additional two prongs...limits the uncertain sweep of the obscenity definition.

Furthermore, unlike the law in *Reno*, the broadcast indecency law has since 1988 provided broadcasters with a "safe harbor" for indecency. In *Action for Children's TV v. FCC*, 852 F.2d 1332, 1342-1343 (1988), the D.C. Circuit concluded:

> Facing the uncertainty generated by a less than precise definition of indecency *plus* the lack of a *safe harbor for the broadcast of (possibly) indecent material*, broadcasters surely would be more likely to avoid such programming altogether...We conclude that... the FCC must afford...notice of reasonably determined times at which indecent material...may be aired. [*Italics* added]

A "safe harbor" from 10 p.m. to 6 a.m. has been in place since 1995, and had ABC aired the *NYPD Blue* episode at issue at 10 p.m. *in all time zones*, it would not have been fined. Fox also could have delayed airing the "Billboard Music Awards" program until 10 p.m. in all time zones.

Respondent ABC, Inc. (*Brief in Opposition*, at 15), states that the 2nd Circuit's "conclusion" about vagueness is "confirmed by the clear chilling effect" the FCC's policy has on "constitutionally protected expression," an effect that is "magnified" by fact that the FCC can now impose a much larger fine for each violation of 18 USC. 1464.

Broadcasting, however, is now dominated by media giants for whom the previous maximum fine was a readily affordable cost of doing business. Now, in an appropriate case, the FCC can levy a much larger fine that will hopefully get the attention of corporate executives. Furthermore, that a potential stiff penalty for unlawful conduct may deter some lawful conduct is not a reason to invalidate the broadcast indecency law.[7]

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[7] *Pacifica*, 438 U.S., at 743 ("[T]he Commission's order may lead some broadcasters to censor themselves. At most, however, the...definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities."); *cf., Alexander v. U.S.*, 509 U.S. 544, 555-556 (1993)("applying RICO's forfeiture provisions to businesses dealing in expressive materials"); E. Volokh, "What speech does 'hostile work environment' harassment law restrict?" 85 *Geo L.J.* 627, 635-637 (1997)("Steering Wide of the Unlawful Zone").

II. IT ISN'T JUST BROADCASTERS WHO MUST USE COMMONSENSE WHEN ASSESSING OFFENSIVE REFERENCES TO SEXUAL ORGANS & ACTIVITIES

The FCC is not only a regulator: it is also an employer. Posted on its new www.fcc.gov website, under the headline, "Understanding Workplace Harassment (FCC Staff): Workplace Harassment is a Form of Discrimination," we find the following:

> **Hostile work environment harassment...**
> [A]ctions that may create sexual hostile environment harassment include:
>
> - Leering, i.e., staring in a sexually suggestive manner
> - Making offensive remarks about looks, clothing, body parts
> - Touching in a way that may make an employee feel uncomfortable, such as patting, pinching or intentional brushing against another's body
> - Telling sexual or lewd jokes, hanging sexual posters, making sexual gestures...
> - Sending, forwarding or soliciting sexually suggestive letters, notes, emails or images...
>
> The anti-discrimination statutes are not a general civility code...The...harassment... [must be] sufficiently severe or pervasive to create a hostile work environment...

If *precision* is constitutionally required for enforcement of the broadcast indecency law, it should also be required with respect to claims of sexual harassment involving a "hostile work environment." If broadcasters are entitled to know in advance *precisely* what is or isn't permitted, then employers and employees are entitled know in advance *precisely* what is or isn't permitted.

The First Amendment makes no distinction between what ordinary citizens say and display in a workplace and what broadcasters say and display over the airwaves. And the "hostile work environment" concept *is anything but precise*,[8] as the following commentary indicates:

M.J. Frank, "The social context variable in hostile environment litigation," 77 *Notre Dame L. Rev.* 437, at 491, 494 (2002):

> Since courts first construed Title VII as outlawing harassment in the workplace, judges and scholars have criticized the vague standard for distinguishing between unpleasant banter and a full-blown case of harassment. One would think that, in time, as the courts addressed more cases, they would be able to discover some guiding principles. But as yet, this has not proven true...Anyone capable of reading the Federal

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[8] *Harris v. Forklift Systems*, 510 U.S 17, 22-23 (1993)("This is not, and by its nature cannot be, a mathematically precise test... [W]ether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.").

> Reporter would have to agree with the sentiments of one district court that attempted to reconcile the conflicting decisions: "The courts deciding summary judgment motions have reached a broad range of conclusions regarding what actions actually constitute a hostile environment." Put more bluntly, many decisions which purport to apply the same standard for defining a hostile environment are inconsistent with one another...

It would be an anomaly indeed if offensive references to sexual organs and activities uttered in a workplace can be punished to protect adults, but not if broadcast into millions of homes to protect not only adults[9] but also children. It would also be an anomaly indeed if employers must assess the sexual content of radio programs broadcast into the workplace to determine whether they contribute to or create a hostile work environment,[10] but broadcasters, have no responsibility to assess whether the same content is indecent as broadcast.

The "hostile work environment" concept also applies in schools, and on January 19, 2001, the U.S. Department of Education (Office for Civil Rights) issued a document entitled, "Revised

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[9] *Pacifica*, 438 U.S. at 748-749; *id.*, at 755 (Powell, J. concurring in Part IV-C of Mr. Justice Stevens' opinion).

[10] See, *Reeves v. C.H. Robinson Worldwide*, 594 F.3d 798, 804 (11th Cir. 2010) ("Nearly every day, Reeves's co-workers tuned the office radio to a crude morning show. Reeves claimed this program featured...regular discussions of women's anatomy, a graphic discussion of how women's nipples harden in the cold and conversations about the size of women's breasts...").

Sexual Harassment Guidance." That document reads in small part as follows:

> OCR considers..."the constellation of surrounding circumstances, expectations, and relationships." Schools should also use these factors to evaluate conduct *in order to draw commonsense distinctions* between conduct that constitutes sexual harassment and conduct that does not... It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. [*Italics* added]

If schools – *and broadcasters too in their capacity as employers*[11] – must use "commonsense" when determining what constitutes to a hostile work environment, why must broadcasters be treated as persons of "infirm mentality"[12] when determining what violates the indecency law?

III. BROADCASTERS WHO HAVE IGNORED CONCERNS ABOUT PROGRAMMING SHOULD NOT BE HEARD TO COMPLAIN ABOUT THE FCC'S INDECENCY POLICY

Despite their protestations, the problem is not that the broadcast TV networks can no longer discern contemporary community standards. *The problem is that they long ago stopped caring much about these standards.* More than two decades ago the networks drastically downsized their standards

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[11] See, *Lyle v. WB TV Productions*, 132 P.3d 211 (Cal. 2006).

[12] *Rosenfeld v. New Jersey*, 408 U.S. 901, at 907, n.1 (1972) (Powell, J., dissenting).

departments;[13] and after doing so programs became more vulgar and sexual, as these studies show:

P. Kloer, "It's 8 p.m. Do you know what your kids are watching?" *Atlanta Journal-Const.* (10/23/95):

> Welcome to TV's family hour, 1995-style. Topics include syphilis, menstruation, condoms, prostitutes and pornography. And those are the jokes. An erosion of standards in recent years in the hour from 8 to 9 p.m., when many young children watch TV, has become a mudslide this season..."[W]when you cuss at somebody, it's a form of verbal assault," says Barbara Kaye, assistant professor of TV studies at Southern Illinois University, who has tracked prime-time profanity...Kaye's research found that use of

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[13] See, e.g., "Television networks censured for 'censor' cutbacks," *Broadcasting*, 9/19/88, where we read in part:

> At one of the three broadcast networks, it is called broadcast standards; at another, program practices; and at a third, broadcast standards and practices...Now, cuts at...ABC, CBS and NBC have started rumblings on Madison Avenue...The rumblings from the advertising community got louder last week with news that two trade association presidents...sent letters to the chief executive officers of ABC, CBS and NBC. Both letters said that cutbacks in standards and practices departments were weakening the network's oversight of commercial material and consequently would also weaken the 'self regulation' which they enjoyed...The combined staff reductions...at the broadcast networks have cut those departments by at least half... Meanwhile, neither the number of programs nor commercials aired is reduced...").

> profanity on TV nearly doubled from 8 to 9 p.m. between 1990 and 1994 – to an average of once every eight minutes on ABC, CBS, NBC and Fox. In addition, in 1990 profanity was more prevalent from 10 to 11 p.m., but by 1994, the earlier time slot had caught up.

D. Kunkel, et al., "Sexual messages on family hour TV," Children Now & Kaiser Family Fdn. (12/11/96):

> [T]he study assesses how messages about sexuality in the "Family Hour" have changed over time by comparing the winter of 1996 sample to a week of network programs that were aired in 1976 and 1986...In 1996, 75% of the programs included some type of sexual content, compared to 65% in 1986 and 43% in 1976...In 1976, only 9% of all programs sampled contained any scene with a primary emphasis on a sexual message; by 1986, 23% of programs included such scenes; and in 1996, 30% of all "Family Hour" programs featured [such] scenes... [pp. 4, 8]

For years now, the broadcast TV networks have also ignored the many opinion polls[14] showing that most adults are concerned about and/or offended by sexual and vulgar content on TV and that they support enforcement of the broadcast indecency law. Their response to these polls has

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[14] See, "What the American public thinks about sex, vulgarity & violence on TV," Morality in Media, 2011, available at *http://www.moralityinmedia.org/full_article.php?article_no=255*.

been to provide even more vulgar and sexual content, as the following surveys show:

B.S. Kaye & B. S. Saplosky, "Offensive language in prime-time TV: Four years after TV...ratings," *J Broadcast Electron,* (Dec. 2004):

> The broadcast industry claims that the content- and aged-based ratings systems adequately alert viewers to offensive content. This study supports assertions that the warning systems give further license to broadcasters to include more profane TV dialogue. The rate per hour of curse words jumped by 51% to about one such word every 8 minutes in prime-time. Offensive language on prime-time TV declined in 1997, but in the 4 years between 1997, when the age- and content-based alerts were first implemented, and 2001, each category of swearing increased. Mild-other words grew in frequency by 44% and excretory words spiked 547%.

Release, "Number of sexual scenes on TV nearly doubled since 1998," Kaiser Family Fdn. (11/9/05):

> The number of sexual scenes on TV has nearly doubled since 1998, according to *Sex on TV 4*, a biennial study released today by the Kaiser Family Foundation...The study examined a representative sample of more than 1,000 hours of programming...All sexual content was measured, including talk about sex and sexual behavior. The study found

> that 70% of all shows include some sexual content, and that these shows average 5.0 sexual scenes per hour, compared to 56% and 3.2 scenes per hour respectively in 1998, and 64% and 4.4 scenes per hour in 2002. These increases combined represent nearly twice as many scenes of sexual content on TV since 1998 (going from 1,930 to 3,780 scenes in the program sample totaling a 96% increase between 1998 and 2005)... During prime time hours sex is even more common with nearly 8 in 10 shows including sexual content, averaging 5.9 sexual scenes per hour.[15]

Decades ago, the TV networks adhered to a voluntary industry code that reflected community standards. They later had "standards departments" that kept programming somewhat in check. Today, the networks push the envelope and then complain they don't know whether the FCC will deem this or that violation of community standards actionable.

If the networks were genuinely concerned about community standards, they would revitalize their standards departments, pay attention to studies and surveys conducted by others, and if needed, conduct their own.[16] They would also

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[15] The Findings section of the *Sex on TV 4* Report states at page 46 that network prime time shows presented sexual content "with somewhat greater frequency than the levels found across the television landscape overall."

[16] M. Greppi, "NBC executives defend their program ways," *N.Y. Post* (7/17/89) ("Tartikoff said NBC is spending more than $100,000 on a study designed to see if the public's taste has... taken a conservative swing...").

listen to mainstream advertisers who don't want to offend viewers with programming they sponsor.[17]

They would also (gasp) *exercise common sense*, because even assuming that adults have become as jaded as the TV networks apparently think, much of their audience consists of children.[18] And here, not just Fox but also ABC had reason to know children would be in the viewing audience. See, e.g., J. Zaslow, "Straight Talk" ("Kim Delaney: She stars in one of TV's most risqué dramas, *NYPD Blue*. But she's horrified that young fans tune in"), *USA Weekend Magazine*, 2/20-22/98:

> Kim Delaney is disturbed when kids recognize her as a star of *NYPD Blue*. Given its raw language, gruesome crimes and explicit love scenes, Delaney says the police drama unquestionably deserves its...TV-14 rating...Recently, when Delaney volunteered to help serve meals to the needy in Los Angeles, "all these little kids were saying they watched the show. I said, 'What are you doing up [at 10 p.m.]? You're not supposed to know who I am!' They just shrugged."

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[17] See, e.g., "Context matters...," Assoc. of Ntl. Advertisers Alliance for Family Entertainment, 8/5/11, available at http://www.ana.net/afe ("[A] group of leading national advertisers...is working hard to provide consumers with entertainment options the entire family can watch without anyone being embarrassed or grabbing for the remote...").

[18] Unlike in the obscenity law area, where a jury ordinarily does not consider children when determining "community standards" (*Pinkus v. U.S.*, 436 U.S. 293, 298 (1978)), the FCC properly considers children when determining whether broadcast content is "patently offensive."

IV. FCC'S CURRENT POLICY ON CONTENT WITH 'SERIOUS VALUE' DOES NOT VIOLATE THE FIRST AMENDMENT

For decades the FCC has assessed the "value" or "merit" of programming when making determinations about broadcast indecency;[19] and in *Action for Children's TV*, 852 F.2d at 1340, the D.C. Circuit held that while "merit is properly treated as a factor in determining whether content is patently offensive...it does not render such material *per se* not indecent." Were it not so, broadcasters could air content that appealed to the prurient interest *and* depicted hardcore sexual conduct, as long as the content, when taken as a whole, had serious value and was therefore not obscene.

Respondent ABC, Inc. nevertheless questions the FCC's ability to "rest indecency determinations on its own artistic judgments." *Brief in Opposition*, at 13-14. If jurors in obscenity cases are deemed capable of assessing "serious value,"[20] however, surely FCC Commissioners can also make such determinations. Furthermore, the FCC is not the only federal agency that must balance artistic value with decency concerns. The National Endowment for the Arts must make similar determinations.[21]

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[19] See, e.g., *Eastern Educ. Radio*, 24 FCC 2d. at 412 (the term "indecent" is applicable and the standard for its applicability is that "the material broadcast is (a) patently offensive...*and (b) is utterly without redeeming social value.*").

[20] See, *Pope v. Illinois*, 481 U.S. 497 (1987); *Hamling v. U.S.*, 418 U.S. 87, 100 (1974)("Expert testimony is not necessary to enable the jury to judge the obscenity of material...").

[21] *NEA v. Finley*, 524 U.S. 569 (1998); see also *Advocates for the Arts v. Thomson*, 532 F.2d 792, 796-797 (1st Cir. 1976).

If ABC disagrees with an FCC ruling involving content with alleged "merit" or "serious value," the appropriate remedy would be to appeal that determination. As this Court stated in *Smith v. United States*, 431 U.S. 291, 305 (1977), a determination about serious value is "particularly amenable to appellate review."

Respondent ABC, Inc. also criticizes the FCC for differentiating between the routine vulgarities heard weekly on its *NYPD Blue* program with the intense vulgarity heard in an early scene of *Saving Private Ryan*. *Brief in Opposition*, at 13.

Amicus did not agree with the FCC's determination that the broadcast of an unedited version of *Private Ryan* during primetime hours did not violate the indecency law. Little would have been lost by bleeping the vulgarity,[22] but much would have been gained in terms of maintaining a decent society and shielding children too young to understand the reason for the cursing.

But *Amicus* does not doubt that Steven Spielberg's purpose in airing intense vulgarity in an early scene of *Private Ryan* was laudable – namely, to depict the reality and horror of war. Had an *NYPD Blue* episode depicted a horrifically violent scene where cursing took place, the FCC may have treated the episode as it treated *Private Ryan*. But the cursing in *NYPD Blue* was of a

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[22] *Pacifica*, 438 U.S. at 743, n.18 ("A requirement that indecent language be avoided will have its primary effect on the form rather than the content of serious communication...")

different kind, as the following commentary by David Hinckley ("Potty-mouths filling the air," *Daily News*, 5/2/03) shows:

> Feeling empty because with the Super Bowl...over, there are no office pools? Here's a suggestion: Guess which *NYPD Blue* character will say the S-word this week. It's a lock to happen. Every new episode of the long-running ABC series, you can absolutely count on it, usually right around 10:30. The S-word is such a regular character, you half-expect to see it get a screen credit...For *NYPD Blue* viewers...the S-word isn't a big leap. Ten years ago, "a–h–" was unheard on prime-time TV. Now, thanks largely to [*NYPD Blue*], it's as common as lottery ads...

ABC, Inc. has also criticized the FCC for differentiating between the gratuitous nudity depicted in the *NYPD Blue* scene at issue here with the disturbing nudity depicted in *Schindler's List*. *Brief for Petitioners*, at 22, 24, 27-28. Former *Newark Star-Ledger* TV critic Alan Sepinwall described that *NYPD Blue* scene as follows in his "Farewell to *NYPD Blue*: Best Moments Ever:"[23]

> *And here's to you, Mrs. Sipowicz* (in "Nude Awakening"): I didn't have room to mention it in the Best Nude Scenes list for *The Star-Ledger*, so I'll slip it in here: Theo walking in on a stark-naked Connie in the Sipowicz family bathroom was arguably the show's

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[23] Available at www.stwing.upenn.edu/~sepinwal/bestmoments.htm.

> most explicit nude scene (even with her hands trying to cover the naughty bits. I think we saw more of Charlotte than we ever saw of Kim or Amy or anyone else)...

Amicus did not agree with the FCC's determination that the broadcast of an unedited version of *Schindler's List* during primetime hours did not violate the broadcast indecency law. Little would have been lost by blurring the nudity,[24] but much would have been gained in terms of maintaining a decent society for all Americans and shielding children too young to comprehend the "political message" behind the nudity.

But *Amicus* does not doubt that Steven Spielberg's purpose in showing nudity in *Schindler's List* was laudable – namely, to depict the humiliation of forced nudity experienced by those who suffered in Nazi concentration camps. Had the camera lingered on a woman's private parts in a titillating manner, the FCC might have decided the matter differently.

When it comes to the matter of "serious value" and *NYPD Blue*, an editorial in *Electronic Media*[25] made an important distinction when it said this of *NYPD Blue's* co-creator Steven Bochco: "What Mr. Bochco wants...is not simply the ability to deal with adult issues, because he already has

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[24] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000)("Being 'in a state of nudity' is not an inherently expressive condition").

[25] Viewpoint, "Hold the line in prime time," 2/24/92.

that. What he wants is the license to include bare-breasted women and explicit language..."

Amicus would add that in an FCC case where the program involved a *serious presentation about sex*, in contrast to vulgar, titillating or pandering references to or depictions of sex, the FCC determined that the content was not indecent. See, *Industry Guidance*, 16 FCC Rcd, at 8011 ("KING-TV, Seattle, "Teen Sex: What about the kids?").

V. THE FCC'S CURRENT POLICY ON 'FLEETING EXPLETIVES' DOES NOT VIOLATE THE FIRST AMENDMENT

When Congress enacted the Radio Act of 1927, Congress did not give broadcasters a right to use the public airwaves to curse or swear at least once in each program (or however often). That Act included a provision making it unlawful to "utter *any* obscene, indecent, or profane language by means of radio communications." [*Italics* added]

While little is known about what prompted regulation of obscene, indecent or profane language in broadcasting, it is highly unlikely that it was the airing of something comparable to the George Carlin "Seven Dirty Words" monologue. In her monograph, "The origins of the ban on obscene, indecent or profane language of the Radio Act of 1927,"[26] Milagros Rivera Sanchez stated:

The earliest complaint dates back to March

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[26] *Journalism Comm Monogr* 149, February 1995.

> 1920. The Radio inspector S.W. Edwards asked the Commissioner of Navigation A.J. Tyrer if the amateur license of E. Ferguson...should be suspended for three months. Ferguson admitted telling another amateur to "go to hell over the air." [At 7-8]
>
> Ms. Rivera Sanchez also observed:
>
> The Congressional records and debates do not provide any evidence that members of Congress were concerned about the First Amendment implications of banning the use of obscene, indecent or profane language from the airwaves...The fact that there was little discussion...is perhaps an indication that at least some free speech advocates did not consider offensive language deserving of First Amendment protection. [At 21]

There is another explanation for the lack of discussion, other than the thinking that such speech was not "deserving" of protection – namely, that Members of Congress and just about everyone else back then understood that the "main purpose" of the First Amendment's freedom of speech and of the press provisions was "'to prevent all such *previous restraints* upon publications'" and not to "prevent the subsequent punishment of such as may be deemed contrary to the public welfare." *Near v. Minnesota*, 283 U.S. 697, 714 (1931).[27]

When the Court said "the prevention and

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[27] See also, *Pacifica*, 438 U.S. at 735-738.

punishment" of the "lewd and obscene, the profane" had never been thought to raise a "Constitutional problem,"[28] they would have also understood that those terms encompassed indecent language.[29]

Perhaps it would be unwise to roll back the clock and to now insist that when Congress said "*any* obscene, indecent or profane language," it meant what it said. *Amicus* contends, however, that it would be *very unwise* to now determine that broadcasters have a right to utter at least one expletive, *regardless of circumstances.*

The 2nd Circuit said the FCC had little to fear if broadcasters were given a right to curse at least once. *Fox TV Stations v. FCC*, 489 F.3d 444, 460 (2d Cir. 2007). But the broadcast TV networks say they must compete with cable, *and on some cable channels indecency is rampant.* Last year CBS launched a new series, *$#*! My Dad Says;* and earlier this year it was reported that ABC planned to air a pilot, *Good Christian B–s.*[30] Furthermore, they cannot predict in live programming what a celebrity will say; and the problem isn't limited to TV. It includes broadcast radio "shock jocks."

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[28] *Chaplinsky v. N.H.*, 315 U.S. 568, 571-572 (1942).

[29] *Rosenfeld v. New Jersey*, 408 U.S. 901, 911 (1973) (Rehnquist, J., dissenting) (use of the f word is "'lewd and obscene' and 'profane' as those terms are used in *Chaplinsky v. New Hampshire*... the leading case in the field"); see also, *Bethel School District*, 478 U.S. at 678, where a prohibition on "use of obscene, profane language" was applied to a student speech that was deemed "indecent, lewd..."

[30] L. Rice, "Kristen Chenoweth joins 'Good Christian' pilot at ABC," www.insidetv.ew.com, 3/14/11.

Amicus would contend that there is a constitutional "middle road" between prohibiting all expletives and allowing at least one – namely, when utterance of one or more expletives amounts to a nuisance, it is actionable. In *Chaplinsky*, 315 U.S. at 571-572, n.4-5, this Court twice cited *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941) where Chafee stated in part, at 149-150:

> But the law punishes a few classes of words like obscenity, profanity...[P]roperly limited they fall outside the protection of the free speech clauses...[P]rofanity, indecent talk and pictures...have a very slight social value as a step towards truth, which is...outweighed by the social interest in order, morality, the training of the young and the peace of mind of those who hear and see... *The man who swears in a street car is as much of a nuisance as the man who smokes there.* [*Italics* added]

In 12 *Am. Jur. 2d* Blasphemy and Profanity 10 ("As common-law nuisance"), we also find the following:

> In view of the requirement of a public nuisance, a single act of profane swearing is generally insufficient as a basis of the offense under the common law, although it is conceivable that under particular circumstances even a single oath may amount to such a nuisance. The use of profane and vulgar words in a public place on a single occasion, whereby the public at large was offended and annoyed, may

amount to a public nuisance rendering profanity punishable under the common law.

The *Pacifica* Court recognized that indecent language could amount to a "nuisance" and upheld the FCC's authority to regulate indecent language when it does.[31] While *Pacifica* emphasized the "narrowness" of its holding, it did not hold that a single expletive could never be actionable.[32] For one thing, *unlike* the indecent language that has proliferated on primetime TV,[33] the George Carlin monologue was an aberration.[34] For another, *unlike* an annual media awards program airing on a major broadcast TV network, the one-time airing

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[31] 438 U.S. at 750; *id.*, at 761 (Powell, J., concurring in Part IV-C of Justice Stevens' opinion); see also, See also, *Rosenfeld v. New Jersey*, 408 U.S. 901, 906 (1972)(Powell, J., dissenting)("The Model Penal Code...also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within the protection of the First Amendment.").

[32] 438 U.S. at 750 ("This case does not involve a two-way radio conversation...or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction..."); *Id.*, at 755 (Powell, J. concurring in Part IV-C of Mr. Justice Stevens' opinion).

[33] See, e.g., Release, "PTC finds increase in harsh profanity on TV," Parents Television Council, 10/29/08 ("[N]early 11,000 expletives...were aired during primetime on broadcast TV in 2007 – nearly twice as many as in 1998...The f-word aired only once on primetime...in all of 1998 – yet it appeared 1,147 times on primetime...in 2007...The s-word, which appeared only two times in 1998, aired 364 times in 2007...").

[34] *Fox TV Stations*, 489 F.3d at 449, n.4 ("At the time, the FCC interpreted *Pacifica* as involving a situation 'about as likely to occur again as Haley's Comet.'").

of the Carlin monologue on a radio station wasn't likely to attract a large audience of children.

Nor did the Court in *Hess v. Indiana*, 414 U.S. 105, 108 (1973), hold that the speech at issue was protected by the First Amendment because the f-word was uttered only once. The *Hess* Court said there was no evidence to indicate that defendant's "speech amounted to a public nuisance in that privacy interests were being invaded."

In *Torres v. Pisano*, 116 F.3d 625, 631 n.4 (1997), *cert. den.*, 522 U.S. 997 (1997), the Court below also recognized that "a single episode of harassment, if severe enough, can establish a hostile work environment."[35]

VI. STRICT SCRUTINY' IS NOT THE APPROPRIATE STANDARD FOR REVIEW OF BROADCAST REGULATION

In *Fox TV Stations*, 489 F.3d at 465, the Court below said it is "increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children" and that the TV networks "rightly rest their constitutional arguments in part" on *United States v. Playboy*, 529 U.S. 803 (2000), where this Court applied

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[35] See also, *Suders v. Easton*, 325 F.3d 432, 444, n.7 (3rd Cir. 2003), *rev'd on other grounds, Penn. State Police v. Suders*, 542 U.S. 129 (2004)("'we cannot state...that a single non-trivial incident of discrimination can never be egregious enough to compel a reasonable person to resign...'").

"strict scrutiny" to a needed law[36] that would have required cable operators to completely scramble the signals for pay porn channels or air the imperfectly scrambled signals only after 10 p.m.

When Congress enacted the Radio Act of 1927, however, radio had not established a "uniquely pervasive presence in the lives of all Americans."[37] By 1930, only 40% of U.S. households had purchased radio receivers;[38] and car radios weren't mass produced until after 1927.[39]

Amicus would also contend that in 1978 it was not broadcasting's "uniqueness" per se that justified its special treatment ***but rather that broadcasting had in fact become pervasive and readily accessible to children, unlike any other form of media in existence***. By 1978, TVs were in almost every home, and radios were in almost every home and car.[40] Children could also carry portable radios by hand; and unlike newspapers, broadcasting was accessible to children too young to read.

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[36] See, R. Peters, "Once Again, U.S. Supreme Court thinks It knows better than Congress," 10 *Nexus J. Op.* 5, 9-13 (2005).

[37] *Pacifica*, 438 U.S. at 748.

[38] Steve Craig, "How America adopted radio: Demographic differences in set ownership...in 1930-1950 U.S. Censuses." *J Broadcast Electron*, Vol. 48, No. 2, 2004.

[39] See, e.g., "This Day in HISTORY (Automotive: September 26, 1928: First day of work at the Galvin Manufacturing Corp.)," www.history.com ("...In 1930, Galvin would introduce the...the first mass-produced commercial car radio.").

[40] The complainant in *Pacifica*, 438 U.S., at 730, "heard the broadcast while driving with his young son."

Today, if anything, broadcasting is even more pervasive[41] *and remains readily accessible to children.* Televisions made before 2000 or with monitors less than 13 inches are not equipped with a V-Chip. The V-Chip also does not block network promos, sponsor ads, sports and "news" programs. Nor does it block *any* broadcast radio programs.

The V-Chip is also only as good as the rating system it utilizes; and many programs aren't properly rated.[42] Many parents also find the ratings inadequate for other reasons.[43] In addition, the only way to block a particular program is to block all programs rated the same. Since almost all primetime entertainment programs are rated TV-PG or TV-14, using the V-Chip to block just a few programs can result in blocking most programs.

Many children also grow up in homes with parents who don't speak English fluently or who are illiterate or disabled. Some parents don't use the V-Chip because they find it is difficult to use or because of unawareness, fatigue, indifference or neglect. Even if parents use the V-Chip, children will often have access to TVs outside the home.

In *Ginsberg v. N.Y.*, 390 U.S. 629, at 639-640 (1968), the Court stated that *two* governmental interests justified the law's limitations upon the availability of sex materials to minors:

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[41] Programming is now re-broadcast on cable, satellite and the Internet.
[42] Special Report, "The Ratings Sham II: TV executives still hiding behind a system that doesn't work," PTC, 4/16/07.
[43] S. Gordon, "Parents find media rating systems inadequate," *HealthDay News*, 6/21/11.

> The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations...upon the availability of sex material to minors...The legislature could properly conclude that parents...are entitled to the support of laws designed to aid discharge of [their] responsibility...The State also has an independent interest in the well-being of its youth... "[T]he knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of..."

Few would disagree with the assertion that parents should be the first line of defense when it comes to protecting children; but when it comes to shielding children from inappropriate mass media content, even diligent parents often fail at the task. Ratings and technology can certainly help but are not the whole answer. Nor is government the whole answer, *but government has a necessary role to play*; and the warning enunciated in *Columbia Broadcasting v. Democratic National Committee*, 412 U.S. 94, 102-103 (1973) is still relevant today:

> Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the...experience of the Commission. Professor Chafee aptly observed: "Once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for

> the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular work of the government..."

Among those *very important tasks* are maintaining a decent society,[44] protecting the privacy of the home,[45] and protecting children.[46]

CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the court below and declare that the FCC's current broadcast indecency enforcement regime is constitutional.

Respectfully submitted,

Patrick A. Trueman
Counsel of Record
for Amicus Curiae

Robert W. Peters
Co-Counsel

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[44] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59 (1973).

[45] *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)("State's interest in protecting the...privacy of the home is certainly of the highest order in a free and civilized society.").

[46] In *Graham v. Florida*, 130 Sup. Ct. 2011, 2026 (2010), this Court again recognized that juveniles have a "lack of maturity and an underdeveloped sense of responsibility" and that they are "more vulnerable...to negative influences." Surely broadcast indecency is among these "negative influences."

AMICUS CURIAE BRIEF

No. 10-1293

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,
v.
FOX TELEVISION STATIONS, INC., *ET AL.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,
v.
ABC, INC., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF BROADCASTERS AND RADIO-TELEVISION DIGITAL NEWS ASSOCIATION IN SUPPORT OF RESPONDENTS

JANE E. MAGO
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

PAUL M. SMITH
ELAINE J. GOLDENBERG
Counsel of Record
JESSICA RING AMUNSON
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

Additional Counsel Listed On Inside Cover

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THE COMMISSION'S INDECENCY POLICY VOID FOR VAGUENESS. 4

II. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE COMMISSION'S POLICY CHILLS PROTECTED SPEECH. 20

III. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE COMMISSION'S AUTHORITY IS LIMITED. 28

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Baggett v. Bullitt, 377 U.S. 360 (1964) 20

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 29

Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729 (2011) 32, 34, 36, 37

CBS Corp. v. FCC, No. 06-3575, -- F.3d --, 2011 WL 5176139 (3d Cir. Nov. 2, 2011) 18

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 31, 37

Cohen v. California, 403 U.S. 15 (1971) 9, 37

Connally v. General Construction Co., 269 U.S. 385 (1926) 17

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 32

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 3, 28, 29

FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) 5

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 31

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 13, 19

Grayned v. City of Rockford, 408 U.S. 104 (1972) 18

Hill v. Colorado, 530 U.S. 703 (2000) 4

Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) 13, 17

Kolender v. Lawson, 461 U.S. 352 (1983) 13

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 17

Reno v. ACLU, 521 U.S. 844 (1997) 19, 20

Sable Communications of California, Inc. v. FCC, 493 U.S. 115 (1989) 29

Smith v. Goguen, 415 U.S. 566 (1974) 14

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) 13

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 36, 37

United States v. Williams, 553 U.S. 285 (2008) 4, 12, 18, 19

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STATUTES

47 U.S.C. § 326 34

Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) 23

ADMINISTRATIVE RULINGS

In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542 (2009) 32

In re Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., 26 F.C.C.R. 4238 (2011) 30

In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globe Award' Program, 19 F.C.C.R. 4975 (2004) 5, 6, 7, 8, 18, 20, 23

In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue," 23 F.C.C.R. 1596 (2008) 12

In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue," 23 F.C.C.R. 3147 (2008) 12

In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507 (2005) 8, 9, 21

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OTHER AUTHORITIES

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INTEREST OF *AMICI CURIAE* [1]

The National Association of Broadcasters ("NAB") is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry, advocating before Congress, the Federal Communications Commission, and the courts on behalf of its members. The vast majority of NAB's members are not large entities; they are local, independent stations.

The Radio-Television Digital News Association ("RTDNA") is the world's largest professional organization devoted exclusively to electronic journalism. RTDNA represents local and network news directors and executives, news associates, educators, and students in broadcasting, cable, and other electronic media in over 30 countries. RTDNA is committed to encouraging excellence in electronic journalism and upholding First Amendment freedoms.

NAB, RTDNA, and their members have serious concerns about the Federal Communications Commission's altered indecency policy, which reversed years of a more considered and restrained approach that showed greater sensitivity to the free

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any party, any counsel for a party, or any person other than *amici*, their non-party members, or their counsel make a monetary contribution intending to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

speech interests of broadcasters and journalists around the country. In particular, NAB and RTDNA are concerned that lack of notice about and discriminatory enforcement of the Commission's indecency policy has had and will continue to have a dramatic nationwide chilling effect on broadcast content that is not actually indecent.

SUMMARY OF ARGUMENT

The Second Circuit correctly found that the Commission's indecency policy is void for vagueness. In the guise of performing "contextual" analyses, the Commission is actually making its own subjective judgments about what content it deems valuable, and what content valueless. Broadcasters are left to guess at how the policy will apply to them – and there is not just a risk but actual evidence that the policy is being applied in a discriminatory manner.

Exacerbating these problems is the Commission's refusal to act on petitions for reconsideration or oppositions to notices of apparent liability with respect to many indecency complaints, which forecloses these Commission decisions from judicial review. Indeed, the Commission's procedural maneuvering appears designed to ensure that its most vulnerable orders never leave the Commission and thus can never be reviewed by a court. Under this regime, broadcasters cannot be sure exactly what the law is and consequently steer far clear of anything that is even arguably indecent.

The chilling effect of the Commission's policy is palpable and broadly felt, particularly by local and independent broadcasters. These are the entities

least able to afford the types of delay and blocking technology on which the government places so much emphasis. These are also the entities that provide much of the nation's local live news coverage, which is particularly imperiled by the Commission's indecency policy. Fearing major fines as a result of live coverage of an event at which a passing expletive may be uttered or nudity fleetingly depicted, broadcasters are reluctantly choosing not to cover certain kinds of events or air certain types of stories or programs at all.

This Court's narrow holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), does not give the Commission authority to implement its vague and chilling indecency policy. And none of the rationales the government offers in defense of the Commission's policy is supportable. This Court has never cited scarcity of broadcast spectrum as a basis for regulating broadcast content. If anything, the government's position as licensor selectively allocating broadcast spectrum resources counsels against permitting content-based restrictions. As to the pervasiveness of broadcast media, even the government acknowledges that broadcasters face stiff competition from cable and other sources of news and entertainment that are not subject to the Commission's censorship. Although the government tries to suggest that the existence of more outlets for speech somehow translates into a greater justification for government restrictions on broadcasters, the opposite is true. Finally, as to the accessibility of the broadcast medium to children, parents already have and use tools to control their

children's consumption of broadcast programming, and there is no reason to believe that they are in need of the government's assistance in this regard. Moreover, this Court has found that other media that are at least as accessible to children – such as video games – may not be censored.

In sum, the Commission's indecency policy is not justified by *Pacifica* and cannot be squared with this Court's First Amendment jurisprudence. The Second Circuit's decision should therefore be affirmed.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THE COMMISSION'S INDECENCY POLICY VOID FOR VAGUENESS.

As the Court of Appeals recounted, the history of the Commission's decisionmaking demonstrates that the vagueness test is more than satisfied here. *See Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 321-24 (2d Cir. 2010) ("*Fox*"). Under that test, a statute or government policy is void for vagueness if it fails "to provide a person of ordinary intelligence fair notice of what is prohibited, *or* is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008) (emphasis added); *see also Hill v. Colorado*, 530 U.S. 703, 732 (2000) (explaining that law can be void for vagueness "for either of two independent reasons"). The Court of Appeals found that because the Commission's indecency "policy" was little more than a series of subjective judgments about what content it found

valuable, there was not just a possibility of discriminatory enforcement of the Commission's policy, but actual *evidence* of discriminatory enforcement. Moreover, the Commission's repeated changes in position, combined with its procedural maneuvering, meant that Respondents had no notice of how the Commission's policy might apply to them. Thus, the Court of Appeals was correct to hold the Commission's indecency policy void for vagueness.

1. In the years leading up to the *Remand Order* at issue, the Commission repeatedly changed position with respect to its indecency policy and applied new standards to broadcasters without even finalizing its decisions. *See Fox*, 613 F.3d at 321-24. A brief look at the recent history of the Commission's actions demonstrates these shifts and inconsistencies, including the Commission's refusal to apply the very standards on which it was purportedly relying.

As this Court previously found, the Commission's decision in *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globe Awards' Program*, 19 F.C.C.R. 4975 (2004) ("*Golden Globe Awards Order*"), marked a significant departure from the Commission's prior policy regarding the use of "fleeting expletives." *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1807 (2009). In the *Golden Globe Awards Order*, the Commission addressed complaints about an unscripted remark made by the singer Bono in accepting an award: "This is really, really fucking brilliant." *Golden Globe Awards Order* ¶ 3 n.4. The

Commission found that this remark was indecent, despite the fact that the Commission had previously refused to take action against broadcasters for the use of fleeting expletives like this one – especially in live programming. *See id.* ¶ 9.

But the new "policy" promulgated in the *Golden Globe Awards Order* provided little information for broadcasters as to whether and when the Commission might find certain expletives to be indecent. Under that policy, "indecent" language is "language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* ¶ 6. The critical words in that definition are "in context." The Commission expounded on its "contextual" inquiry by stating that it would consider three principal factors: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value. *See id.* ¶ 7.[2] The Commission also stated that it

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[2] These three factors, and the Commission's definition of "indecent" language, first appeared in "industry guidance" issued by the Commission in 2001. *See In re Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7,999, ¶ 30 n.23 (2001) ("*Indecency Policy Statement*"). But the 2001 statement gave a number of "examples" in which

would "weigh and balance" these factors and "possibly, other factors" to reach a determination. *Id.*

The Commission then proceeded to completely ignore all of these factors in performing its analysis in the *Golden Globe Awards Order*. Instead, the Commission focused primarily on what it described as its "responsibility to safeguard the well-being of the nation's children from the most objectionable, most offensive language." *Id.* ¶ 9. The Commission also stressed that its finding of indecency was "based on the specific facts before [it]." *Id.* ¶ 2.

The Commission's decision thus left broadcasters to wonder exactly which of those "specific facts" would make a difference in their cases. Was it the use of the word "fucking" itself – which the Commission described as "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language" – that dictated the indecency ruling? *Id.* ¶ 9. Or was it that the use of the expletive "on a nationally telecast awards ceremony[] was shocking and gratuitous," warranting sanction? *Id.* Was it that the network "could have" but did not "delay[] the broadcast for a period of time sufficient . . . to effectively bleep the offending word"? *Id.* ¶ 11. Or was it that there was, in the Commission's view, no "political, scientific, or other independent value of use of the word here"? *Id.* ¶ 9. The Commission itself suggested that this final fact was of limited relevance, observing that its decision

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fleeting and isolated utterances of expletives, as well as various depictions of nudity, were *not* found to be indecent. *See id.* ¶¶ 12-23.

should not be read "to suggest that the fact that a broadcast had a social or political value would necessarily render use of the 'F-Word' permissible." *Id.* ¶ 9 n.25.

Unfortunately, further clarification from the Commission was not forthcoming. The broadcasters moved in 2004 for partial reconsideration of the *Golden Globe Awards Order*, but the Commission never acted on their petitions and thus never finalized the order for judicial review.[3] Yet the Commission nonetheless used the non-final *Golden Globe Awards Order* as license to begin making subjective and value-laden judgments about the use of expletives.

The next application of the Commission's policy came in *In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507 (2005) ("*Saving Private Ryan Order*"). In that order, the Commission indicated that not every use of the word "fucking" would trigger an enforcement action. That word was used multiple times in "Saving Private Ryan," along with several other expletives. Yet the Commission refused to impose sanctions for the movie's broadcast, finding that "this case is distinguishable from that in which we previously found the use of the word 'fucking' during the

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[3] The briefs regarding reconsideration of the *Golden Globe Awards Order* are available at http://www.fcc.gov/eb/broadcast/Plead.html.

broadcast of the 2003 Golden Globe Awards ceremony to be indecent and profane." *Id.* ¶ 18.

The Commission focused on a single factor that purportedly distinguished the cases: whether there was "any political, scientific or other independent value" to the use of the expletives. *Id.* (quotation marks omitted). Of course, this is not one of the three factors the Commission had previously enumerated in attempting to explain the contextual test for identifying "patently offensive" broadcast material. Applying this new factor, however, the Commission found value in the use of multiple expletives during "Saving Private Ryan" but not in the use of a single expletive during the Golden Globe Awards. According to the Commission, in "Saving Private Ryan" the use of expletives was "integral to the film's objective of conveying the horrors of war through the eyes of these soldiers," *id.* ¶ 14, even though the "soldiers" were actors reading from a script. But the use of an expletive was not "integral" to a real singer's "objective of conveying" his surprise, joy, or appreciation at receiving a Golden Globe award, even though the expletive was, in context, used as an "intensifier" and did not have any sexual connotation whatever. *See Cohen v. California*, 403 U.S. 15, 25-26 (1971) (explaining that "words are often chosen as much for their emotive as their cognitive force" and that the "emotive function . . . may be the more important element of the overall message sought to be communicated").

Thus, following the *Saving Private Ryan Order*, broadcasters were still left to wonder which uses of

expletives the Commission would deem valuable and which valueless. In *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, ¶¶ 72-86 (2006) ("*Omnibus Order*"), *vacated in part on other grounds*, 21 F.C.C.R. 13,299 (2006), the Commission purported to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible," *id.* ¶ 2, but actually just created more confusion. The Commission addressed the Fox broadcasts at issue in this case, along with a number of other broadcasts, and stated that "[o]verall, the decisions demonstrate repeatedly that we must always look to the context in which words or images occur to determine whether they are indecent." *Id.* In fact, overall, the decisions demonstrated that the Commission's "contextual" analysis was little more than a rote recitation of factors under which the Commission was making its own subjective judgments about whether or not certain language or images were "essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." *Id.* ¶ 97; *see also* Br. of Respondent Fox Television Stations, Inc. 7-8 (describing inconsistencies in the rulings in the *Omnibus Order*); Br. of Respondent ABC, Inc. 17-21 (discussing numerous inconsistencies in Commission decisions regarding nudity).

No doubt recognizing the infirmity of its *Omnibus Order* and seeking to evade judicial review, the Commission responded to the broadcasters' appeal of the Order by requesting a voluntary remand and

then vacating much of the Order. *See In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13,299, ¶ 9 (2006) ("*Remand Order*"). In the *Remand Order*, the Commission reversed some findings of indecency, reaffirmed some findings, and refused to address some findings.

Far from providing clarity, however, the *Remand Order* further confused broadcasters, as it marked yet another change in position by the Commission. Most egregious was the Commission's about-face with respect to an indecency complaint about the use of the word "bullshitter." In the *Omnibus Order*, the Commission had found that a single utterance of the word during CBS's "The Early Show" was indecent. "[M]ost important" to that analysis was the fact that the word had been used "during a morning news interview," which in the Commission's view made it "shocking and gratuitous." *Omnibus Order* ¶ 141. But in the *Remand Order*, the Commission completely reversed position, finding that it was the use of the word during "news programming" that made it *not* indecent. Thus, the *same exact reasoning* led to both a finding of indecency and a reversal of the indecency finding. *See Remand Order* ¶¶ 67-73.

The Commission's lack of coherent analysis also extends to the context of fleeting nudity. With respect to the ABC broadcast at issue here, when the Commission issued its Notice of Apparent Liability finding that a portion of "NYPD Blue" totaling seven seconds was indecent because a woman's buttocks

were shown, it did little more than recite its three-factor test and then simply assert in conclusory fashion that "although the broadcast of nudity is not necessarily indecent in all contexts, taking into account the three principal factors in our contextual analysis, we conclude that the broadcast of the material at issue here is apparently indecent." *In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 F.C.C.R. 1596, ¶ 16 (2008). And although the Commission later purported to address broadcasters' concerns about the standardless nature of its policy on nudity, its clarifications added little to the analysis. In its subsequent Forfeiture Order, the Commission found "easily distinguishable" other cases in which it had declared that nudity was not necessarily graphic or explicit, but did not explain what distinguished them. *In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 F.C.C.R. 3147, ¶ 14 & n.42 (2008). And while the Commission attempted to harmonize these kinds of inconsistencies by declaring that its analysis was "best viewed on a continuum rather than as a binary," it did not provide guidance that would allow broadcasters to place themselves on that "continuum." *Id.* ¶ 15.

2. As this history makes clear, the Commission's policy has more than just the potential for "seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. Indeed, seriously discriminatory enforcement is the hallmark of the policy.

Despite the fact that this Court has described assessment of the risk of discriminatory enforcement as the "more important aspect of vagueness doctrine," *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), the government's brief remarkably says nothing at all about the Second Circuit's holding in that regard. Instead, the government faults the court for looking at the "policy's application to broadcasts not before the court and . . . perceived inconsistencies between those applications." Pet. Br. 18. But it was entirely proper for the court to look to whether the policy was *resulting* in discriminatory enforcement when assessing whether the policy had the *potential* for discriminatory enforcement. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) ("[t]he question is not whether discriminatory enforcement occurred *here*, . . . but whether the [law] is so imprecise that discriminatory enforcement is a real possibility" (emphasis added)); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) ("conflicting results which have arisen from the painstaking attempts" to apply the new policy are an "abundant demonstration" of vagueness). There was no consideration of hypothetical applications of the Commission's policy to situations not before the court, *cf. Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) – rather, the Second Circuit examined only actual applications of the policy to actual broadcasters.

As the Second Circuit correctly found, there is hard evidence here of discriminatory enforcement, amounting to undeniable proof that the policy has a "standardless sweep" that permits the Commission

"to pursue [its] personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). The Commission has deemed the fleeting use of certain expletives acceptable in one context but unacceptable in other contexts that are not meaningfully distinguishable. *See supra* p. 8. The same inconsistencies characterize the Commission's decisions with respect to brief moments of nudity. For example, why is a seven-second display of a woman's buttocks indecent when it occurs in the context of the acclaimed drama "NYPD Blue," the primary theme of which is the life of law-enforcement officers, while 40 seconds of nudity in a broadcast of the movie *Catch-22* is not indecent when it occurs "in [the] context of a full length drama, the primary theme of which was the horrors of war?" Letter from Norman Goldstein to David Molina, FCC File No. 97110028 (May 26, 1999); *see also* Br. of Respondent ABC, Inc. 17-21 (describing various inconsistencies in FCC decisions involving nudity). The only explanation that makes sense of all of these conflicting decisions is that the Commission is indulging its own views about which programming is sufficiently worthy of protection.

Such discriminatory enforcement is all the more troubling because the Commission has engaged in gamesmanship to shield its most vulnerable orders from judicial review. Most remarkably, as noted above, the Commission refused for years to rule on the petitions for reconsideration submitted in response to the *Golden Globe Awards Order*, even as the Commission continued to apply and even expand the policy announced in that Order in subsequent cases.

Moreover, in the *Remand Order* itself, the Commission ensured that only the rulings it wanted to have judicially reviewed would reach the Court of Appeals. The Commission performed a complete, largely unexplained about-face with respect to a fleeting expletive on "The Early Show," first holding that its placement in a morning news program made it particularly shocking, then reversing course and holding that its placement within a news program exculpated it from an indecency finding. *Remand Order* ¶¶ 67-73. The Commission similarly played procedural games with its indecency determinations regarding language in various episodes of the dramatic program "NYPD Blue." In the *Omnibus Order*, the Commission found various uses of the word "bullshit" to be actionably indecent, dismissing the broadcasters' argument that use of the word "was necessary for dramatic effect." *Omnibus Order* ¶ 130. That holding is in tension, to say the least, with the *Saving Private Ryan Order*, where a dramatic effect that the Commission considered to be essential to the artistic work was held to justify the repeated use of expletives.[4] But in the *Remand*

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[4] For example, why is use of expletives in depicting life-and-death police activities considered indecent when the same expletives are not considered indecent in "Saving Private Ryan"? In the course of its analysis of profanity in "NYPD Blue," the Commission stated its view that while "the expletives may have made some contribution to the authentic feel of the program, we believe that purpose could have been fulfilled and all viewpoints expressed without the broadcast of expletives." *Omnibus Order* ¶ 134. Again, how the Commission determines the "authentic feel" of the program is left unexplained – and

Order, the Commission vacated this holding on a technicality involving the location of the person submitting the complaint against "NYPD Blue" – suggesting that it will likely reach a similar holding in future cases, but without permitting timely review of its decision.

In one of the most egregious examples of such evasiveness, the Commission has still failed to act on oppositions to the Notice of Apparent Liability regarding the broadcast by a small non-commercial station of the Martin Scorsese-produced documentary "The Blues: Godfathers and Sons." That documentary contains interviews of blues performers, a record producer, and other individuals in which the interviewees use "fuck," "shit," and their derivatives. In its decision on "The Blues," the Commission stated that the use of expletives was not "essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance," *Omnibus Order* ¶ 82, and contrasted this with "Saving Private Ryan," where, it determined, the "nature of the artistic work" would have been altered by substituting other language for expletives, *id.* But the 2006 decision condemning "The Blues" as indecent is still not final, and thus not ripe for consideration by the courts, because the Commission has refused to act on the broadcasters' oppositions to its Notice of Apparent Liability. *See Remand Order* ¶ 30 n.86 (declining to address broadcasters' arguments and stating that it would

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this is a textbook example of a standard with potential for discriminatory enforcement.

"address such issues in further proceedings in that case").

These delays leave the Commission's Notice of Apparent Liability decisions effectively precedential and compound the already significant problem of discriminatory enforcement, as those against whom the Commission's policy is enforced are denied the opportunity for timely judicial review. Thus, the Commission's actions and inactions have insulated its recent indecency holdings from judicial reversal, while forcing broadcasters to attempt to comply with a constantly shifting and discriminatory indecency policy.

3. In this case, the problem of discriminatory enforcement is closely linked to the problem of lack of notice – an independent basis for finding the Commission's policy unconstitutionally vague. *See, e.g., Humanitarian Law Project*, 130 S. Ct. at 2720 (explaining that laws that call for "'wholly subjective judgments'" are vague for lack of notice). Because broadcasters "must necessarily guess at [the Commission's] meaning and differ as to [the] application" of its policy, *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), that policy cannot stand.

As an initial matter, there can be no dispute that the policy is not, on its face, "sufficiently explicit" to inform broadcasters as to "what conduct on their part will render them liable to [the Commission's] penalties." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Indeed, this Court has previously described the *very same standard* that the Commission claims to be enforcing as one that calls

for "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meaning." *Williams*, 553 U.S. at 307. The Commission's enumeration of various amorphous factors, coupled with its statement that it would "weigh and balance" these factors and "possibly, other factors" when deciding whether to impose penalties on broadcasters, *Golden Globe Awards Order* ¶ 7, is quintessentially vague.[5]

Under these circumstances, it is hard to see how the government is aided by its insistence that decisions made after the broadcasts at issue here aired are irrelevant to the analysis. Unless the Commission's application of its policy has clarified matters so as to cure the lack-of-notice problem inherent in the words of the policy itself, then the policy must necessarily fall. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (in evaluating policy for vagueness, court looks not only to the "'words of the ordinance,'" but also to the "interpretation . . . given by those charged with

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[5] In addition, at the time the broadcasts at issue here aired, the Commission's approach to fleeting expletives and fleeting nudity had not yet changed. The government's statement that imposition of penalties with respect to the Fox broadcasts would have been improper seems to be a tacit concession that the broadcasters had no notice that the Commission would alter its course and begin treating fleeting expletives as impermissible. *See* Pet. Br. 31; Br. of Respondents CBS Television Network Affiliates 13-17. Indeed, the Third Circuit recently explained that the Commission's March 2004 change of position as to fleeting "indecency" was sudden and could not have been anticipated. *CBS Corp. v. FCC*, No. 06-3575, -- F.3d --, 2011 WL 5176139, at *17-18, 26 (3d Cir. Nov. 2, 2011).

enforcing it" (internal quotation marks omitted)); *Gentile*, 501 U.S. at 1048-51.

Moreover, this Court has held only that plaintiffs who engage in conduct that is "clearly proscribed" are not permitted to complain of the vagueness of the law as applied to others, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *see also Humanitarian Law Project*, 130 S. Ct. at 2719 – and has "relaxed that requirement in the First Amendment context." *Williams*, 553 U.S. at 304; *see also Reno v. ACLU*, 521 U.S. 844, 870-74 (1997). The whole point of Respondents' vagueness challenge is that given the way in which the Commission has applied its indecency policy, they had no idea whether their conduct was "clearly proscribed."

The Court of Appeals therefore correctly looked to the Commission's actual application of its policy in assessing the issue of fair notice. In fact, as the court concluded, the Commission's enforcement actions have only compounded the lack-of-notice issues inherent in the definition of indecency. Each of the Commission's determinations of indecency has been simply a wholly subjective judgment about the worth of allegedly indecent material. Thus, four-letter words and depictions of nudity are sometimes artistically necessary and sometimes shocking and gratuitous – but broadcasters are left to guess in which "context" such content might be acceptable. Given the Commission's multiple changes in position, as well as procedural maneuvering that left certain decisions not final and not subject to judicial

review, it would have been nearly impossible for Respondents, or for any broadcaster, to predict how the Commission might apply its policy to them in the decisions at issue.

II. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE COMMISSION'S POLICY CHILLS PROTECTED SPEECH.

The Commission's about-faces and constantly shifting positions "raise[] special First Amendment concerns because of [their] obvious chilling effect on free speech." *Reno*, 521 U.S. at 871-72. With little or no idea what position the Commission may take in any particular case, broadcasters will "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

That is not just a hypothetical concern; there is ample evidence that the Commission's policy has in fact chilled a significant amount of protected speech. When the Commission first embarked upon its standardless indecency quest in the *Golden Globe Awards Order*, it blithely asserted in a footnote that it did "not envision that today's action will lead to licensees abandoning program material solely over uncertainty surrounding whether the isolated use of a particular word is indecent." *Golden Globe Awards Order* ¶ 11 n.30. But that is exactly what has happened. With no clarity from the Commission about how it will apply its indecency policy and the specter of enormous fines hanging over their heads, broadcasters have indeed abandoned program

material solely over uncertainty about how the Commission's policy will apply.

1. Notably absent from the government's brief is any discussion of the myriad examples discussed by the Court of Appeals of how broadcasters' protected speech has been chilled by the Commission's indecency policy. As the Second Circuit recounted, uncertainty about the Commission's policy has led to broadcasters' decisions not to air the Peabody Award-winning "9/11" documentary containing live footage in which expletives were uttered; not to go forward with a planned reading of acclaimed author Tom Wolfe's novel *I Am Charlotte Simmons* because of "adult" language; not to air a political debate because one of the local politicians involved had previously used expletives on air; and not to broadcast live coverage of a memorial service for Pat Tillman, the football star killed in Afghanistan, because of language used by his family members to express their grief. *See Fox*, 613 F.3d at 334-35.

But the examples cited by the Court of Appeals are just the tip of the iceberg. Despite the Commission's holding that it was acceptable for fake soldiers in a fictional movie to use repeated expletives "to convey to viewers the extraordinary conditions in which the soldiers conducted themselves with courage and skill," *Saving Private Ryan Order* ¶ 14, broadcasters still err on the side of caution in censoring expletives used by real soldiers describing their experience of a real war. Thus, PBS offered its affiliates only an edited version of the film "A Company of Soldiers," a Frontline documentary

that follows the Army's Eighth Cavalry Regiment stationed in Baghdad during the Iraq War. PBS required stations that wanted to broadcast the unedited version of the film to sign a waiver acknowledging that PBS would not indemnify them in the event the film was found to violate the Commission's policy on indecency. *See* Edward Wyatt, *PBS Warns Stations of Risks from Profanity in War Film*, N.Y. TIMES, Feb. 18, 2005, at C2.

Similarly, in offering its affiliates a Frontline documentary entitled "The Solider's Heart," an examination of the psychological impact of the Iraq war on soldiers, PBS "decided to offer PBS stations two versions – one edited which bleeps the expletives – based on legal counsel's assessment of the risk for possible FCC fines." PBS Statement, *available at* http://blogcritics.org/video/article/the-soldiers-heart/. PBS informed its affiliates that its decision was "based on current interpretation(s) of FCC guidelines, which provide no clear-cut or official rulings to guide our decisions." *Id.* Thus, "[r]egretfully, in this uncertain climate, [PBS was] compelled to err on the side of caution. Neither PBS nor its member stations has the financial means to wage a legal battle in the courts if subject to FCC sanctions regardless of the editorial merits of this program." *Id.*

2. As such examples illustrate, the chilling effects of the Commission's policy are often felt by small, local broadcasters, which are the majority of *amici*'s members. Such broadcasters are certainly not exempt from the Commission's indecency regime.

Indeed, the Commission imposed a $15,000 fine on the San Mateo County Community College District for its airing of the documentary "The Blues." *Omnibus Order* ¶¶ 72, 85. Stations like this one can ill afford to risk such fines. That is all the more true given the ten-fold increase in the maximum forfeiture for violating the Commission's indecency regulations, which in June 2007 went from $32,500 to $325,000 per violation.[6]

Small and independent broadcasters also produce much of the nation's live programming in the form of local news coverage. These broadcasters have reported that *all* live news coverage is at risk due to the Commission's indecency policy. As the CEO of Liberty Corporation, which owns 15 TV stations, has explained, "[l]ive TV as we know it could be imperiled . . . . We have no choice but to take necessary precautions." Allison Romano, *Reporting Live. Very Carefully*, BROADCASTING & CABLE, July 3, 2005, *available at* http://www.broadcastingcable.com/article/157682-Reporting_Live_Very_Carefully_.php.

Although the Commission has referred to the "ease" of blocking expletives on live programming due to "technological advances," *Golden Globe Awards Order* ¶ 11, that characterization is inaccurate. The costs of implementing delay systems

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[6] *Increase of Forfeiture Maxima for Obscene, Indecent, and Profane Broadcasts to Implement the Broadcast Decency Enforcement Act of 2005*, 72 Fed. Reg. 33,914 (June 20, 2007) (codified at 47 C.F.R. § 1.80). The maximum forfeiture was raised pursuant to the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006).

are borne disproportionately by small and independent broadcasters, not the big networks. As just one example, a local broadcaster spent approximately $200,000 to outfit its twenty-four stations with delay technology, and also bore the significant cost of paying staff to function as in-house censors. Romano, *supra.* These "costs are prohibitive for small-market stations." *Id.* In addition, even where delay technology can be feasibly implemented, it relies on split-second judgments that may well fail to capture material that the Commission later deems offensive – as in one of the Fox broadcasts at issue in this very case.[7]

As a result, broadcasters have been forced to rethink whether and how to present local and national news and sports. The "play it safe" attitude engendered by the *Golden Globe Awards Order* strikes at the heart of broadcast news, which, by its very nature, is live and uncensored. In the past, the Commission wisely recognized that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *In re 'Petition for Clarification or Reconsideration' of a Citizen's Complaint against Pacifica Foundation Station WBAI(FM), New York, NY,* 59 F.C.C.2d 892, ¶ 4 n.1 (1976) (quotation marks omitted). In those instances, the Commission stated, it would be "inequitable . . . to hold a licensee responsible for indecent language." *Id.* Now, given

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[7] Use of delay technology may also, of course, result in erroneous censorship of material that is not indecent under any conceivable standard.

the inherent ambiguity in the Commission's decisions and the specter of significant fines and other penalties, local broadcasters are hesitant to offer live coverage of events "likely to produce offensive speech." *Id.*

Thus, live reports from journalists embedded with U.S. troops have been suppressed, and broadcast footage from war zones has been withheld from broadcast. Broadcasters have expressed concerns about carrying live audio or video from arraignments and trials, emotionally charged demonstrations, and the scenes of breaking news such as disasters. Many broadcasters are also concerned about or have decided against carrying live high school or college sporting events or locker room interviews.

Most recently, broadcasters have reported that they will not cover the "Occupy Wall Street" protests live for fear that a microphone may pick up a stray expletive and subject the station to fines. Instead, in some instances, broadcast journalists have aired sanitized coverage of these protests and have deleted language that, in their sound editorial judgment, might otherwise have been included to present an accurate account and best inform the audience about the protest participants and their opinions. *See, e.g.*, Frank Mungeam, *Video: KGW Crew Harassed at Occupy Portland*, KWW.com (Nov. 8, 2011, 4:19 p.m.) *available at* http://www.kgw.com/news/local/Video-shows-KGW-crew-harassed-at-Occupy-Portland-133496118.html.

Broadcasters' concerns – and thus the chilling effect of the FCC's policy – also extend beyond the

possibility of fleeting expletives, as broadcasters struggle with how to deal with the shifting Commission policy on nudity. This is well illustrated by local news coverage of the April 2011 attack on the Paul Gauguin masterpiece "Two Tahitian Women" at the National Gallery. Local television stations reporting on this event either blurred out the nipples of the bare-breasted women in the painting or cropped the shots so as to show the women only from the shoulders up. *See* Lisa de Moraes, *The TV Column: News Stations Weigh Whether To Cover Gauguin's 'Tahitian Women,'* WASH. POST, Apr. 11, 2011. This kind of sanitization is, in itself, a form of censorship – and an entirely predictable result given the FCC's inconsistent decisions regarding depictions of nudity.

3. The chilling effect of the Commission's policy is further enhanced by the possibility that broadcasters will settle and enter consent decrees rather than risk an indecency finding and massive fines.[8] Settlements, of course, insulate the Commission's notices of apparent liability from

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[8] *See, e.g.*, Lili Levi, First Amendment Center, *The FCC's Regulation of Indecency*, at 21 (Apr. 2008), *available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_.final_.pdf (discussing large settlement agreements to resolve indecency complaints); Clay Calvert, *The First Amendment, the Media, and the Culture Wars: Eight Important Lessons from 2004 About Speech, Censorship, Science, and Public Policy*, 41 Cal. W. L. Rev. 325, 352-53 (2005) (noting pressure on Viacom to reach global settlement from multiple indecency complaints).

judicial review while effectively dissuading other broadcasters from airing similar content.

Especially troubling are provisions the Commission has insisted on in certain settlements that impose harsh penalties not just on broadcasters but also on their individual employees, even when mere *allegations* of indecency arise. For example, to settle three allegations of indecency associated with broadcasts from Howard Stern and the Opie and Anthony show, Viacom agreed in a 2004 consent decree to pay $3.5 million and to subject all of its broadcast stations to the following condition imposed by the Commission:

> If a Viacom-owned station receives a Notice of Apparent Liability for a broadcast occurring after the Effective Date which relates to violation of the Indecency Laws, all employees airing and/or materially participating in the decision to air such material will be suspended and an investigation will immediately be undertaken by Viacom.

In re Viacom, Inc., Consent Decree, 19 F.C.C.R. 23,100, ¶ 8(f) (2004), *aff'd on recon.*, 21 F.C.C.R. 12,223 (2006). In other words, employees were to be immediately suspended even upon allegations of indecency.

In this way, the chilling effect of the Commission's indecency policy is being pushed down to the level of individual employees, whose livelihood is dependent on avoiding any risk of airing indecent content. The severe penalties associated with even *non-final* indecency allegations help ensure that

broadcasters' employees will steer far afield of any content that is arguably indecent, and self-censor even non-indecent content. And given that the Commission has dramatically expanded the scope of what content is even arguably indecent while avoiding finally resolving its indecency cases, the chilling effect of the Commission's policy will be broadly felt.

III. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE COMMISSION'S AUTHORITY IS LIMITED.

The Commission argues that its regulatory regime, which plainly results in the chilling of protected speech, is justified by this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). But the holding in *Pacifica* was a narrow one, *see, e.g.*, *id.* at 751, and does not give the Commission the authority it seeks here. As demonstrated above, under the guise of performing a "contextual" analysis, the Commission is actually making wholly subjective judgments about what content it deems sufficiently authentic, artistic, or scientific enough to be broadcast over the airwaves. That does not fall within the scope of the *Pacifica* Court's reference to "context."

In *Pacifica*, this Court employed a "nuisance rationale" when it held that the Commission has the authority to regulate certain content in broadcasting even where such content is not obscene. In finding that the Commission had appropriately deemed George Carlin's "Filthy Words" monologue indecent, this Court stressed that "context is all-important,"

but qualified what it meant by "context" by referring back to the "nuisance rationale" animating its holding. As the Court phrased it, a nuisance is "merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." 438 U.S. at 750 (quotation marks omitted). Thus, the Court essentially equated context with the time and place the allegedly indecent material was broadcast. For more than a quarter century after *Pacifica*, the Commission heeded this Court's admonition about the "narrowness of [the *Pacifica*] holding," *id.*; *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989) (*Pacifica* was "an emphatically narrow holding"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (same), and limited its indecency enforcement actions to those in which the pig was simply in the parlor rather than the barnyard. Now, however, the Commission regularly engages in speculation about whether the pig is artistically necessary or authentic enough to warrant an appearance in the parlor. Thus, the Commission has gone from treating all pigs as equal to finding that some pigs are more equal than others. *See* George Orwell, ANIMAL FARM: A FAIRY STORY (1945).

The government offers three rationales for the vast expansion of the government's indecency policy beyond the "nuisance rationale" limits of *Pacifica*: "the scarcity of available broadcast frequencies, the pervasive presence of the broadcast media, and the unique accessibility of broadcast programming to children." Pet. Br. 42. None of these three reasons justifies the current policy.

1. As an initial matter, the *Pacifica* Court did not rely on a scarcity rationale in reaching its decision. Despite the conspicuous absence of scarcity arguments in *Pacifica*, Petitioner here insists that "[s]o long as the federal government must exercise selectivity in allocating limited spectrum among numerous licensees . . . it may constitutionally require licensees to accept content-based restrictions that could not be imposed on other communications media." Pet. Br. 43-44. Petitioner gets it exactly backwards. It is precisely *because* the government is exercising selectivity in allocating spectrum among numerous licensees that the threat of content-based restriction is so pernicious. The government's authority to use content-neutral means to select among potential licensees cannot be transformed into authority to give preference to the messages it likes.

Yet that appears to be exactly what is happening. In fact, the Commission is using its power as licensor to withhold licenses or renewals where indecency complaints are pending and *have not even been adjudicated yet.* In several instances involving *amici*'s members, the Commission has used the mere pendency of indecency complaints as a basis for declining to process stations' license renewal applications. *See, e.g., In re Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 F.C.C.R. 4238, ¶ 271 (2011) (noting that Commission action on 11 NBCU television station license renewal applications "has been stayed in part due to pending indecency complaints filed against the stations").

The Commission's leveraging of its power over licensing and assignment decisions as part of its indecency policy has a direct financial impact on broadcasters. It inhibits license assignments, because license renewal is necessary before assignment to a purchaser. And even when a license is renewed by means of a tolling agreement on pending indecency complaints, the unresolved complaints have a negative impact on license valuation and can inhibit a license owner's refinancing and recapitalization. The impact when licenses are assigned is even more stark: in cases of license owners who are selling their license but no longer doing business, the Commission has required the previous license owner to place into escrow the maximum fine for a potential indecency forfeiture. That highly questionable practice constitutes, in essence, the imposition of a monetary penalty without any finding as to the validity of a complaint.

This Court has long held that the First Amendment bars the government from establishing a licensing scheme that provides the licensor with the ability to suppress speech and places no limits on its discretion. *See, e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). The fact that the government is administering a licensing scheme for a supposedly scarce resource does not mean that such First Amendment requirements are relaxed. If anything, it means that First Amendment concerns are heightened.

2. Petitioner's second rationale is broadcast media's "pervasive presence." Pet. Br. 44-45. Petitioner acknowledges, of course, that things have changed dramatically since *Pacifica*, as people now turn to cable, satellite, and Internet sources for news, information, and entertainment. Yet somehow Petitioner sees the proliferation of non-broadcast outlets for speech as a justification for *more* content-based regulation of the speech aired by broadcast media. That rationale makes no sense. The government cannot censor books because readers could watch a movie instead; it cannot censor video games because their creators could convey a similar message in a comic book. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011). Likewise, it cannot censor broadcast media just because viewers and content-creators have other options available to them.

Further, the existence of more outlets for speech means that there is *less* justification for government restrictions only on broadcasters. Cable television is now itself a "pervasive presence in the lives of all Americans." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 745 (1996) (plurality opinion) (quotation marks omitted). Thus, broadcasters operate in a highly competitive environment, much more so than they did when *Pacifica* was decided. *See, e.g.*, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, ¶ 8 (2009). Although Petitioner argues that almost nine out of every ten households in the United States subscribe to cable or satellite services,

Pet. Br. 44, Petitioner never acknowledges what these statistics mean for broadcasters who are forced to compete against cable and satellite providers that are not (and could not constitutionally be) subject to the Commission's indecency regulations. For example, as explained above, broadcasters airing live programming are forced to institute time-delay technology, find additional staff to work as censors, and even make difficult choices about whether to cover certain events at all. Cable and satellite providers face none of those burdens, and can carry live events *live* with no additional costs and nothing to fear from the Commission. *See, e.g.*, J.A. 288-89. And with respect to non-live programming, cable and satellite providers are able to offer their viewers content that broadcasters simply cannot.

There is thus no small irony in the government's position. The government repeatedly emphasizes the central importance of broadcast media, noting that some viewers do not subscribe to or employ cable or satellite and quoting NAB's own statements that "99% of the public relies on local television stations . . . for diverse programming services" and that "[n]o other information platform can match the reach and reliability of free, over-the-air broadcasting." Pet. Br. 45 (quotation marks omitted). But to the extent that broadcasters are hampered in competing against other outlets, and as a result lose audience to cable and other unregulated entities, broadcasters ultimately will be less able to fulfill their public interest obligations and offer the important national and local news, emergency

information, and other public affairs programming on which viewers rely.

The government's position is also without any obvious limit. If the government were right that the Commission can regulate the content of broadcast media as a condition of licensure, *but see* 47 U.S.C. § 326 (forbidding the Commission from imposing "censorship" as a condition of access to the airwaves), and if the growth of broadcast-media alternatives were only to *increase* the Commission's authority in this regard, then there would be nothing stopping the Commission from imposing virtually any content-based restriction it chose. Broadcasters fully accept that they have a responsibility to operate in the public interest and that the government may regulate limited aspects of the broadcast medium. But the government cannot be correct that the state of the marketplace gives it *carte blanche* to regulate content without any limits on its discretion.

3. Third, as to the supposedly "unique accessibility of broadcast programming to children," the government justifies the Commission's regulatory regime on the grounds that disturbing it would "upset parents' settled expectations." Pet. Br. 42, 52. That rationale is curious, given the relatively recent shift in Commission policy that gave rise to the case at hand. *See supra* p. 5. It also runs headlong into this Court's recent decision in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), which expressed serious "doubts that punishing third parties for conveying protected speech to children just in case their parents

disapprove of that speech is a proper governmental means of aiding parental authority." *Id.* at 2740.

Here, as in *Brown*, there is no reason to believe that the parents the government says it is attempting to assist actually need or want the government's intervention. A study by the Kaiser Family Foundation found that "most parents seem pretty satisfied with the oversight [of media use] they're able to offer. Two-thirds (65%) say they 'closely' monitor their children's media use." The Henry J. Kaiser Family Foundation, *Parents, Children, and Media*, at 1 (June 2007), *available at* http://www.kff.org/entmedia/upload/7638.pdf. Advances such as the ratings system and parental control technologies like the V-Chip have given parents the tools they need to make their own choices about what type of speech they want to keep out of their homes. Thus, it is not parents who are the driving force behind the Commission's indecency policy. In fact, in past years, a single activist group has submitted the vast majority of indecency complaints to the Commission – 99.9% in one year. Todd Shields, *Activists Dominate Indecency Complaints*, ALLBUSINESS, Dec. 6, 2004, *available at* http://www.allbusiness.com/services/motion-pictures/4459242-1.html.

Nonetheless, the television industry has been doing its part to keep parents educated about the tools available to them to monitor media usage. In 2006 alone, the industry spent $340 million on an advertising campaign to help educate parents about their ability to monitor media usage with the TV

Parental Guidelines rating system and the V-chip and to encourage parents to take an even more active role in their children's television viewing. *See* Comments of Nat'l Ass'n of Broad. at 2, *In re Implementation of the Child Safe Viewing Act*, MB Docket No. 09-26 (FCC Apr. 16, 2009) ("*Parental Tech Comments*").

Although the government discusses "deficiencies" in the V-chip and deems it "inadequate as a substitute for broadcast indecency regulation," Pet. Br. 49, parents who use the V-chip find it valuable. *Parental Tech Comments* at 14. Moreover, a "narrow focus on V-chip use (or the use of any other single tool) misses the larger picture – that parents believe they are successfully managing their children's TV viewing with the tools and strategies they have on hand today." *Id.* at 3. Thus, the effectiveness of the Guidelines and V-chip must be viewed within the broader context of the wide variety of tools, including cable and satellite set-top boxes, available to parents to help manage their children's viewing. While parents may opt to use other available tools for a variety of reasons, that does not mean that the Guidelines or V-chip are ineffective.

Nor does it mean the Commission is permitted to step into the shoes of parents everywhere and make its own choices about what children should be permitted to see or hear. *See Brown*, 131 S. Ct. at 2741; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000) (stating that "[a] court should not assume a plausible, less restrictive alternative would be ineffective, and a court should

not presume parents, given full information, will fail to act"). Even assuming that the government had a compelling interest in helping parents block certain content from their children (which it does not), the V-chip is a "feasible and effective means of furthering" such an interest. 529 U.S. at 815. Thus, the government "cannot ban speech." *Id.*

* * *

In short, none of Petitioner's reasons for the vast expansion of its regulatory authority is tenable. *Pacifica* was a narrow holding, and does not provide the Commission with the license to punish speech using "*post hoc* rationalizations" and "shifting or illegitimate criteria." *City of Lakewood*, 486 U.S. at 758. And this Court has made abundantly clear that "esthetic and moral judgments about art and literature" are "for the individual to make, not for the Government to decree." *Playboy*, 529 U.S. at 818; *see also Brown*, 131 S. Ct. at 2741; *Cohen*, 403 U.S. at 25 (discussing "matters of taste and style" where "government officials cannot make principled distinctions"). The Commission's esthetic and moral judgments about whether or not allegedly "indecent" material is integral to a broadcast are forbidden by the First Amendment. "It is rare that a regulation restricting speech because of its content will ever be permissible," and this is not one of those instances. *Playboy*, 529 U.S. at 818.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

JANE E. MAGO
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 200036
(202) 429-5430

KATHLEEN A. KIRBY
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-3360

PAUL M. SMITH
ELAINE J. GOLDENBERG
Counsel of Record
JESSICA RING AMUNSON
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

Counsel for amici curiae

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1293

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, *Petitioners,*
v.

FOX TELEVISION STATIONS, INC., ET AL., *Respondents.*

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, *Petitioners,*
v.

ABC INC., ET AL. *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL RELIGIOUS BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

CRAIG L. PARSHALL
Counsel of Record
GENERAL COUNSEL,
NATIONAL RELIGIOUS
BROADCASTERS
9510 Technology Dr.
Manassas, VA 20110
cparshall@nrb.org
(703)330-7000
Attorney for the Amicus Curiae

JOSEPH C. CHAUTIN III
ELISE M. STUBBE
HARDY, CAREY, CHAUTIN &
BALKIN, LLP
Co-Counsel
1080 West Causeway
Approach,
Mandeville, LA 70471
(985)629-0777

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Law Library

16

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS 1
SUMMARY OF ARGUMENT 2
ARGUMENT 8
I. The Court of Appeals fatally ignored the"Community Standards" element of the FCC Rules 8
A. The "community standards" element is an integral and constitutionally valid part of the FCC policy 8
B. "Community standards" counsel in favor of the FCC rulings 12
II. The Court of Appeals misjudged the supposed "harm" to free speech 16
III. Reversal will foster First Amendment Values 20
A. The *Pacifica* case was misapplied by the Court of Appeals 20
B. The *Brown* case counsels reversal of the Court of Appeals 25
CONCLUSION 28

TABLE OF AUTHORITIES

Cases **Page**

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535 U.S. 564 (2002) 3, 9, 10, 11, 12

Beach v. Yellow Freight Sys., 312 F.3d 391
(8th Cir. 2002)..... 15

Bethel School Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 27

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School Dist. No. 26 v. Pico, 457 U.S. 853 (1982).. 27

Brown v. Entertainment Merchants Assn.,
131 S. Ct. 2729 (2010) 6, 7, 26, 27

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315 U.S. 568 (1942) 27

Erznoznik v. Jacksonville, 422 U.S. 205 (1975) ... 11

Farrell v. Burke, 449 F.3d 470 (2d Cir. 2006) 8

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129 S. Ct. 1800 (2009) 18, 20, 23, 24

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390 U.S. 629 (1968) 27

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Reeves v. C.H. Robinson Worldwide, Inc.,
594 F.3d 798 (11th Cir. 2010) 15

Reno v. ACLU,
521 U.S. 844 (1997) 10, 11, 12

Rush v. Scott Specialty Gases, Inc.,
113 F.3d 476 (3rd Cir. 1997) 16

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512 U.S. 622 (1994) 22, 23

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Tutman v. WBBM-TV, Inc./CBS, Inc.,
209 F.3d 1044 (7th Cir. 2000) 15, 16

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(9th Cir. 2009) 12, 13

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United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 18

United States v. Stevens, 130 S. Ct. 1577 (2010) 26

Statutes, Regulations and Legislative History

47 U.S.C. § 231 (e)(6) 9

47 U.S.C. § 534(a) 22

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Public Telecommunications Act of 1992 § 16(a), Pub. L. No. 102-356, 106 Stat. 954 18

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The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 23

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Thomas W. Hazlett, Sarah Oh, Drew Clark, *The Overly Active Corpse of Red Lion*, Northwestern Journal of Technology and Intellectual Property, Fall 2010 25

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INTEREST OF THE AMICUS[1]

The Amicus herein, National Religious Broadcasters ("NRB") is a non-profit membership association with offices in Manassas, Virginia and Washington, D.C. It represents the interests of Christian broadcasters and communicators throughout the nation. The President and CEO of NRB is Frank Wright, Ph.D. The vast majority of our members are broadcasters in the television and radio industry, and include both commercial and non-commercial stations and networks. For more than half a century, the mission of NRB has been to help protect and defend the rights of Christian media and to insure that the channels of electronic communication stay open and accessible for Christian broadcasters to proclaim the Gospel of Jesus Christ, and to minister to the spiritual welfare of the United States.

NRB supports the Petitioners in this case because the Court of Appeals for the Second Circuit has committed a serious error by invalidating the indecency policy of the Federal Communications Commission ("FCC" or "Commission") on First

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk which consent to the filing of all amicus curiae briefs in support of either party or of neither party. No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* provided any monetary contribution to its preparation or submission.

Amendment grounds, ruling that the subject policy was void for vagueness. Admittedly, NRB believes that as a general rule the Commission should leave broadcasters, including religious stations, free to produce and generate broadcast content without unnecessary or unreasonable interference. On the other hand, NRB believes that the welfare of America, its families, and its youth, will be detrimentally affected by electronic mass communications which are allowed to contain, during children's viewing hours of 6 am to 10 pm, unrestrained indecency, whether in language or imagery.

We also believe that reversal of the Court of Appeal's decision will further a rational paradigm of free speech values, and will maintain the reasonable balance that has been struck by this Court between that expansive field of expression currently protected from government prohibition, and the short list of those types of speech that fall into narrow, well-defined exceptions which can be subjected constitutionally to content-based government sanction. The broadcasting of indecent content during children's viewing hours fits squarely within those well-established First Amendment exceptions, and the Commission's policy gives ample, sufficiently clear notice to broadcasters of what is prohibited.

SUMMARY OF ARGUMENT

The Court of Appeals failed to address a lynchpin feature of the indecency policy of the FCC. In determining whether broadcast content is "indecent," the Commission's regulation measures the "patently offensive" nature of that content by the yardstick of

"contemporary community standards for the broadcast medium," an element ignored by the Court of Appeals in its decision that the policy was unconstitutionally vague. As a result, the lower court reached its conclusion without considering the fact that this "community standards" element provided the necessary notice to broadcasters of what was prohibited.

This Court has previously affirmed the constitutionality of a "community standards" approach in the context of on-line obscenity aimed at children, in *Ashcroft v. ACLU*, 535 U.S. 564 (2002). Further, the key elements in the FCC's policy here are strikingly similar to other elements of the law under review that was upheld in *Ashcroft*, namely: that there be a gratuitous sexual component of the communication, and also that exemptions apply to content containing *serious social value*, thus excluding, in words of the Commission, such things as "bona fide news" coverage, or where the otherwise indecent content is justified by "artistic necessity," the Commission having pledged itself to give due deference to expression with "social, scientific, or artistic value."

The "community standards for the broadcast medium" language in the Commission's policy clearly gives broadcasters adequate notice of those boundaries where acceptable content ends and indecency begins. This is illustrated by current examples of the broadcast industry continuing to sanction on-air staff who use verbal crudity similar to the language at issue in this case, even when it is clear that the Commission's policy would be inapplicable: as when the incident occurs after 10 pm

at night (when the policy does not apply) or under circumstances where one of the FCC's explicit exemptions would otherwise protect the language that was used.

The Court of Appeals also miscalculated the supposed harm that the Commission's indecency policy imposes on broadcasters. The lower court failed to appreciate, first, that the rule is not a total prohibition, but is a limited policy, geared to those hours when children are most likely to be within a television viewing audience, and that it ceases to apply to programs after 10 pm. Second, the lower court reasoned, wrongly, that the Commission has in the past reached supposedly different outcomes when applying its indecency policy to allegedly similar programs. However, those two broadcasts that contained profane language – the airing of the highly realistic World War II movie "Saving Private Ryan" and a television documentary called "The Blues" which dwelt on a musical genre – can be easily distinguished.

There was logic to the FCC's application of the artistic necessity exemption to "Saving Private Ryan" which portrayed men in a life-and-death conflict, just as there was also a reasoned basis for the Commission's refusal to apply that exemption to the program about blues music because the extreme language there was neither compelled by, nor critically integral to that subject. Third, the Court of Appeals underestimated and in some instances failed to recognize the practical tools that are available to broadcasters and which make the blocking or avoidance of indecent content highly feasible and not cost-prohibitive. Such tools include delayed

broadcasts, or the use of minimal, seconds-long delay together with the "bleeping" of profanity, as well as standard indemnity agreements with on-air talent that shift the burden of indecency fines and attorneys fees from the station to the policy-violating person.

Reversal of the Court of Appeals decision will also restore vitality to the legal logic and common sense inherent in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The lower court disempowered the force of *Pacifica* by emphasizing a perceived decrease in broadcast prevalence since the time of that decision together with an increased influence of cable and satellite television viewing in American homes. Yet, as we point out, those trends are neither fully accurate nor are they static. Current data shows that broadcasting content is on the rise by some three and a half million viewers compared to 2010. At the same time, studies show a significant decrease in the penetration by cable television within viewing markets.

Moreover, the Court of Appeals also failed to recognize that traditional broadcast content continues to be pervasive even among Americans who have cable or satellite systems, as a result of FCC-mandated "must carry" rules applicable to cable, or "carry one-carry all" rules for satellite transmission. Thus, if in the future indecent content is allowed to proliferate on over-the-air broadcasts, that kind of troublesome content will necessarily find its way into the homes of cable and satellite viewers as well. If the FCC's policy is invalidated in this case, then even those families who intentionally avoid the purchase of viewing packages that contain indecent

material in their subscriptions to cable or satellite systems will still have offensive content entering their homes, this time from unregulated broadcast content that is transmitted through must – carry, or carry one – carry all rules. The "safe haven" for children's viewing that was recognized and upheld in *Pacifica* would, in that event, not only be eradicated for over-the-air broadcast audiences but would be eliminated to a certain degree for cable and satellite viewers as well.

This Court can reaffirm the vitality of *Pacifica* without resorting to the "scarcity of spectrum" factor mentioned in *Red Lion Broad. Co., v. FCC*, 395 U.S. 367 (1969). *Spectrum scarcity* is neither a lynch-pin nor an integral aspect of the Commission's authority to regulate indecency. Instead, as pointed out by this Court in *Pacifica*, such authority inheres in the FCC's position as overseer of the "public interest" in broadcast communications.

Lastly, reversal of the decision of the Court of Appeals for the Second Circuit would be consistent with the First Amendment paradigm outlined in this Court's recent decision in *Brown v. Entertainment Merchants Assn.*, 564 U.S. ___, 131 S. Ct. 2729 (2010) and also with the long line of cases that have upheld indecency restrictions on expression in the case of minors. In *Brown*, this Court stressed the narrow, limited list of those exceptions – like obscenity – where the content of communications can be prohibited without running afoul of the First Amendment. Because indecent content carried over broadcast airwaves during children's viewing hours is legally tantamount to obscenity, both can be restricted constitutionally without imperiling the

generous breadth of the Free Speech provisions of the First Amendment regarding other forms of expression. In several cases in other contexts this Court has reaffirmed that a form of indecent speech that would be otherwise unrestricted for adults can be prohibited when it is made available to children.

While NRB stands zealously committed to the free speech, religious freedom, and free press liberties of communicators, we would stress that those rights must be properly understood jurisprudentially before they can be properly applied. The exceptions of the First Amendment must be historically understood in the context of the intentions of our Founders and as illustrated through America's history and traditions and of course in the precedents of this Court. This Court has wisely been loathed to create new exceptions to the First Amendment – as illustrated by the *Brown* decision. The corollary to that is also true: this Court should be loathed to abandon its very short list of narrow, well-defined, historically recognized exceptions to free speech, which in this case includes indecent expression when it is reasonably defined and appropriately regulated by the Federal Communications Commission.

For all of these reasons, this Court should reverse the decision of the Second Circuit Court of Appeals.

ARGUMENT

I. THE COURT OF APPEALS FATALLY IGNORED THE "COMMUNITY STANDARDS" ELEMENT OF THE FCC RULES

A. The "community standards" element is an integral and constitutionally valid part of the FCC policy

As the Court of Appeals noted in its decision, the policy of the FCC *measures* the legality of a given broadcast, and whether it is "patently offensive," only by reference to "contemporary community standards for the broadcast medium." *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 322 (2d Cir. 2010). The question not answered by the Court of Appeals was whether this "community standards" element provided the sufficient notice to broadcasters, thus giving them a "reasonable opportunity to know what is prohibited." See: *Fox Television Stations*, 613 F.3d at 327, citing *Farrell v. Burke*, 449 F3d 470, 485 (2d Cir. 2006) for the "void for vagueness" principle.

It is difficult to understand how the FCC's policy could be properly analyzed without dealing with the "community standards" element, yet the Court of Appeals failed to analyze that issue. After all, the FCC's foundational 2001 policy expressly stated that the question of "whether the broadcast is 'patently offensive'" is to be "*measured by* contemporary community standards for the broadcast medium." *Fox Television Stations*, 613 F.3d at 322 (emphasis added).

This Court has upheld the validity of regulations that prohibit certain indecent expression based on a "community standards" approach. In *Ashcroft v. ACLU*, 535 U.S. 564 (2002) this Court upheld the constitutionality of the Child Online Protection Act (COPA), which outlawed "indecent and patently offensive communications" over the World Wide Web if they are deemed "harmful to minors;" that phrase was fashioned after the obscenity test of *Miller v. California*, 413 U.S. 15 (1973), to-wit: the material proscribed is that which (a) an "average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;" (b) depicts specified sexual content or actions "in a manner patently offensive with respect to minors," and (c) "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." *Ashcroft*, 535 U.S. at 570, citing 47 U.S.C. § 231 (e)(6) (COPA) (internal quotation marks omitted).

It is clear that the FCC's indecency policy has relied on the substance of the *Miller* test as incorporated into the COPA, an approach which was validated in *Ashcroft*. While the First Amendment infirmity that was claimed (and rejected) in *Ashcroft* was one of *overbreadth*, and the basis of the Second Circuit's opinion here was that the FCC's policy was void for *vagueness*, that distinction does not undermine our analogy to *Ashcroft*. There is a functional inter-relation between the overbreadth

analysis and the vagueness test, the later being subsumed on some occasions into the former. [2]

It is clear that key elements of the FCC policy are strikingly similar to the COPA law upheld in *Ashcroft*. For instance, the policy at issue here incorporates the "contemporary community standards" element in determining whether a broadcast is "patently offensive." Likewise, in construing COPA this Court determined that the question of whether a communication is "'patently offensive' ... is also a question of fact to be decided by ... applying contemporary community standards." *Ashcroft*, 535 U.S. at 576, n. 7.

In addition, the FCC policy here further incorporates two critical elements similar to those two tests which Congress had added to COPA and which this Court in *Ashcroft* found to be central to its decision upholding the Internet obscenity law there; elements which were found missing, by contrast, in the law under review in *Reno v. ACLU*, 521 U.S. 844 (1997), where this Court struck down on First Amendment grounds the provisions of the Communications Decency Act of 1996 (CDA) – Congress' first attempt to protect children from pornographic material on the Internet. In *Ashcroft* this Court noted that COPA had successfully adopted two prongs of the *Miller* test: the first prong, the

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[2] " ... the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 6 (1982), reh. den. 456 U.S. 950 (citations omitted).

"prurient interest test," is further defined as "material ...[which is] in some sense erotic." *Ashcroft, supra* at 579, citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 213, n. 10 (1975).

This *prurient interest* test is materially similar to the criteria in the FCC policy; for, as the Court of Appeals noted, that policy provides that a broadcast which "describe[s] or depict[s] sexual or excretory organs or activities," may be determined to be "patently offensive," if, in part, "the material appears to pander or is used to titillate ..." *Fox Television Stations*, 613 F.3d 317, 321-22 (2d Cir. 2010).

The second critical *Miller* element present in COPA (and also identifiable in the FCC policy here) was the exemption for "works with serious literary, artistic, political, or scientific value." *Ashcroft* at 578. Both of these two elements – the *prurient interest* test and the *serious value* exemption - were found lacking in the CDA, thus causing it to be invalidated in *Reno. Id.* at 578.

A version of the *serious value* exemption can likewise be identified in the FCC policy: exempted from the policy are communications that are part of "bona fide news" coverage, or which fit into the "artistic necessity exception," i.e. where the objectionable content is "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." *Fox, supra* at 331. The FCC has pledged itself to giving due deference to expression that has "social, scientific, or artistic value." *Id.* at 332, citing *Saving Private Ryan, 21 FCC Rcd. 4507, at P 11.* We see nothing in the FCC's treatment of

the offending communications at issue here that casts doubt on the Commission's commitment to proper free speech calibrations in applying its policy.

The Court of Appeals favorably cited *Reno's* warnings about the First Amendment protection that is to be afforded even "indecent" expression. *Fox*, 613 F.3d at 325. Yet, in the final analysis, for the reasons stated above, the FCC policy here more closely resembles the pornography restriction upheld in *Ashcroft*, than the law struck down in *Reno*, and should be upheld for many of the same reasons.

B. "Community standards" counsel in favor of the FCC rulings

The Court of Appeals opined on the creative ways in which current society invents new forms of crudity, and suggested that perhaps "foul language [is] common" more so now as compared to a few decades ago in the immediate aftermath of *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Yet the societal evidence confirms a different point: that both the media, and the culture at large still continue to recognize traditional boundaries of decency in ways that are strikingly applicable to this case. Such evidence should not be necessary, given the fact that the FCC is an agency deemed to possess expertise in broadcasting matters, and deference to its judgments is the starting point. Nevertheless, this data is further corroboration that the Commission has properly gauged "community standards" for broadcasters when it comes to indecency. [3]

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[3] There is a difference of opinion among two Circuits regarding whether a national rather than a local "community standard"

In the years since the FCC's last policy refinement in 2004, broadcasting stations and programmers have continued to treat on-air profanity as a forbidden practice, even when it concerns broadcasts that are likely to occur *after* the hours regulated by the FCC policy (6 am to 10 pm) or where there is no probable threat of Commission action against them because the circumstances clearly indicate that the policy would not be applicable.

This year an NBC national television news analyst was suspended for use of a word "d—k" during a discussion of the President's news conference.[4] There could have been little chance of an FCC sanction for that on-air comment, firstly, because it fit squarely within the Commission's exemption for "bona fide news" coverage; secondly because that was the same word uttered in a different broadcast for which the FCC found no violation of its policy, a point noted by the Court of

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should be applied in on-line obscenity cases. See: *United States v. Little*, 365 Fed. Appx. 159 (11th Cir. 2010); *United States v. Kilbride*, 584 F.3d 1240, 1252-54 (9th Cir. 2009). But this distinction is irrelevant here: The FCC policy implies a national broadcasting standard, the Commission is presumed to possess the expertise to determine that national standard, and the Respondent broadcasters are obviously engaged in national broadcasting.

[4] "NBC News Analyst Suspended for Obama Obscenity," FoxNews.com, June 30, 2011; http://nation.foxnews.com/nbc-news/2011/06/30/nbc-news-analyst-utters-obama-obscenity-live-air.

Appeals. *Fox*, 613 F.3d at 330. The fact remains that, quite apart from fear of any FCC sanctions, broadcasters are concerned about the sensibilities of viewers, as well as about journalistic standards, ratings, and the potential loss of advertising dollars if they air profane content.

This type of voluntary enforcement among broadcasters of a "community standard" regarding the avoidance of profanity is a widespread practice. A New York television station terminated a reporter for using an on-air, four-letter profanity (the firing was later amended to employee discipline in arbitration); the station's spokesperson stated that the reporter "violated a universally recognized taboo in the broadcast industry." [5] In another instance, an on-air TV anchor's use of a single profanity, even though it occurred at a non-sanctionable time after 10 pm, forced her to publicly apologize for using a "word that many people find offensive." [6] Public apologies are customary, including among affiliates of Fox, one of the respondents, for inadvertent profanity even when it occurs in the late evening hours when the FCC policy doesn't apply. [7] Apologies are also routinely offered even when they are clearly not punishable because they involve an innocent slip-

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[5] "Station Erred in Firing Reporter Who Cursed, Arbitrator Says," New York Times.com, June 1, 2006.

[6] "NBC anchor under fire after using F-word on live TV," The Daily Voice.com, May 14, 2008.

[7] "Fox 5's Ernie Anastos tells weatherman to 'Keep F---ing that chicken' on the air; says he's sorry," New Daily News.com, September 17, 2009.

of-the tongue. [8] CNN has enforced a no-profanity rule with one particular comedian known for her use of crude language, even though she appears during the network's New Year's Eve special, at hours not reachable by the FCC's policy. [9]

Similar standards exist in the radio industry regardless of the technical application, or inapplicability, of the FCC indecency policy, and even include a suspension of a radio host for profanity used off-the-air at a station-sponsored event. [10] And, of course, similar examples for the lack of tolerance for profanity and public depictions of nudity exist in legal contexts: degrading profanity in the workplace, together with posted images of sexually suggestive nudity, have been found to support charges of sexual harassment. [11] Public

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[8] "WDBJ slip-up a viral sensation," The Roanoke Times, Roanoke.com, June 11, 2011.

[9] "Kathy Griffin: If I Curse on New Year's Eve CNN Will Immediately Yank Me Off Live TV," Mediaite.com, December 18, 2010.

[10] "Karel and engineer fired in one-paragraph e-mail and three-minute phone call," Examiner.com, November 11, 2008 (termination for profanities when the staff wrongly thought the microphone was off); " 'Mob' talk dooms radio show," New York Post.com, April 23, 2011 (cancellation of program for profanity during call-in show); "Air America Host Suspended for Clinton Slur," The New York Times.com, April 4, 2008 (program host suspended for "abusive, ad hominem language" at a public event, though not on the air).

[11] *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811-12 (11th Cir. 2010). See also: *Beach v. Yellow Freight Sys.*, 312 F.3d 391, 394-95 (8th Cir. 2002); *Tutman v. WBBM-TV,*

officials, like firemen and teachers, have been terminated or suspended over the displays of nude photographs in the work place, or showing music videos to students that contain sexually-charged nudity. [12] With these common standards being enforced nation-wide in other social situations, it is hard to believe that broadcasters can claim that they are left only to guess that what "indecency" means, particularly in the context of the FCC's detailed rules.

II. THE COURT OF APPEALS MISJUDGED THE SUPPOSED "HARM" TO FREE SPEECH

The Court of Appeals described a parade of free speech *horribles* supposedly resulting from the FCC policy, both "chilling effects" that were alleged to have actually taken place, and those that may occur in the future. *Fox Television Stations*, 613 F.3d 317, 333-35 (2010). [13] Amicus Curiae National Religious Broadcasters is particularly sensitive to the needs of

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Inc./CBS, Inc., 209 F.3d 1044, 1046-47 (7th Cir. 2000); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 482-83 (3rd Cir. 1997).

[12] Laura Fisherman, "Victoria Firefighters Terminated Over Nude Photos at Station," Houston Employment Laws Blog.com, April 13, 2011; Shannon Halligan, "Teacher resigns over racy music video," WWLP.com, June 22, 2011.

[13] To the extent the lower court considered future *hypothetical* "burdens" on broadcasters who want to venture into indecent content during the regulated time periods, it fails to meet the high legal hurdle established by this Court: as invalidating the FCC policy should be considered "strong medicine" to be used "only as a last resort." *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (citations omitted).

broadcasters and public communicators to enjoy the full panoply of First Amendment rights. Because we represent Christian broadcasters and communicators, we also have the unique status of regularly advocating a *triumvirate* of those rights: not only free speech and freedom of the press, but freedom of religion as well. Nevertheless, despite our heightened concern for First Amendment rights as a general matter, we do not see them violated here, and we conclude that the "chilling effects" relied on by the lower court are illusory.

The Court of Appeals contends that the "chilling effect" of the subject policy is evidenced by the supposed disparity of outcomes in the application of the FCC policy. The court contrasted the result in "Saving Private Ryan," a "mainstream movie," as against the outcome for "The Blues," a music documentary. *Id.* at 333-35 (2010). Both involved profanity, though the court emphasized that the Commission permitted it in the former (a highly graphic depiction of the Normandy Invasion during World War II) yet it rebuked it in the later, a contrast that bewildered the lower court. *Id.* at 333.

Yet the distinction made by the Commission had a reasoned basis: profanity could easily be viewed as *integral* to the visceral responses of soldiers caught in the middle of unimaginable brutality; on the other hand, while crude language might be a *chosen* trademark among some musicians, it could hardly be said that inclusion of profanity was *compelled by*, or *essential to* a documentary that had as its real subject matter an exploration of a particular musical genre.

It also must be underscored that the policy at issue is not a total ban on indecency. [14] Significantly, there was a near-total absence of discussion by the Court of Appeals of the actual time limitations of the FCC policy, which only restricts indecent content during those hours where children are most likely to be watching television or listening to the radio. [15] As this Court noted in its previous decision regarding the FCC policy: it was one "which Congress has instructed the Commission to enforce between the hours of 6 am and 10 pm Public Telecommunications Act of 1992, § 16(a), 106 Stat. 954, note following 47 U.S.C. § 303." *FCC v. Fox Television Stations, Inc.*, 556 U.S. ___, 129 S. Ct. 1800, 1806 (2009). Thus, as the Court of Appeals noted, stations are free to slot controversial matter *after* 10 pm, as one station did for the on-air reading of a novel because of a complaint regarding its "adult language." [16] *Fox Television Stations, supra* at 334.

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[14] The Court of Appeals opines that it "can think of no reason" why the rationale in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) which applied "strict scrutiny" to regulations for cable television pornography, should not apply here to broadcast content. *Fox*, at 327. But the obvious "elephant in the room" here is the fact that unlike *Playboy* which involved a "total ban" on speech, *Id.* at 325, the subject policy is in this case is time-of-day limited.

[15] We found only one mention, and that was only a partial one in a footnote: a fleeting reference to the fact that the hours after 10:00 pm are within the "safe harbor" (exempt from indecency restrictions). *Id.* at 324, n.5.

[16] The inference by the lower court that the station's stated concern over the "language" of the book violating the FCC policy was the sole motivating factor in rescheduling the

There are also practical tools, standard in the industry, to shift the burden of those financial costs connected with the broadcast of indecent material where the offending party disregards the policies and warnings of the station. The University of California lists a set of broadcast guidelines as an example which includes this: "Among other things, broadcasters should notify on-air talent, personalities, and guests that reimbursement of FCC fines and attorneys fees, as well as termination, may result from talent's utterance or depiction of obscene, indecent, or profane material during a broadcast." [17]

Of course, broadcasters have still other options available to insure effective compliance with FCC policy: delayed broadcast of potentially indecent content rather than live transmission; and use of minimal broadcast transmission delay plus the

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program is questionable, given the artistic value exception in the FCC rule; nevertheless, for reasons other than merely the "language" of the book (i.e. the subject matter of the novel itself) the FCC policy may not have had much "chilling effect" if at all. The novel, "I am Simmons," by Tom Wolfe presented graphic sexual content that would also have made it, on the whole, a problematic choice for programming consideration during children's listening hours. According to one reviewer, the novel portrayed a "vision of eroticism" on college campuses that was "dark," and the plot centered on one particular "sex-crazed, alcohol-drenched" college campus. Cristina Nehring, "Big Wolfe on Campus," New York Magazine Book Review, Nymag.com, May 21, 2005.

[17] DowLohnes, "Obscenity, Indecency, and Profanity: Guidelines For Broadcasters," June 2006 accessed at: http://www.ucop.edu/irc/services/documents/guidelines.pdf.

"bleeping" of expletives. [18] The First Amendment rights vaunted by the lower court are best preserved by legal decisions that rightly discern the difference between real threats and mere shadows. The Court of Appeals has based its decision on perceived burdens to broadcasters that are more shadow than substance.

III. REVERSAL WILL FOSTER FIRST AMENDMENT VALUES

A. The *Pacifica* case was misapplied by the Court of Appeals

In its decision, the Court of Appeals goes to great lengths to describe the changes in the "media landscape" in America, mentioning the influence of cable television, satellite services, and the Internet; that line of argument being only relevant to the question of whether the assumptions underlying this Court's ruling in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), are still valid, notably the "pervasiveness" of over-the-air broadcasts into the homes of American families and the "accessibility to children" of that content. *Fox Television Stations*, 613 F.3d 326-27. The network respondents had argued below that those assumptions are passé and therefore *Pacifica* is no longer authority, *inter alia*, for the application of the intermediate level of scrutiny that has been applied in its wake. The Court of Appeals formally declined to nullify *Pacifica*, but

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[18] "The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission's stepped-up enforcement policy." *FCC v. Fox Television Stations*, 129 S.Ct. at 1813.

accomplished nearly the same result by reducing it to practical oblivion, calling it "an intentionally narrow opinion," and having "limited scope." *Id.* at 327 and 333. The Court of Appeals has strongly suggested that the basis of *Pacifica* is to be questioned. It's sympathy to the argument of the networks reveals a misunderstanding both about the current prevalence of broadcasting and about *Pacifica* itself.

The lower court's reference to a perceived increasing dominance of cable television cited above and its views on the changes in the "media landscape" underlay its low view of *Pacifica's* vitality. Yet recent data is showing an interesting development that contradicts the court's assumptions. Studies are now demonstrating an increase in over-the-air broadcast viewing by more than three and a half million viewers in the last year. [19] At the same time, cable television preference has been declining to the lowest point since 1989. [20]

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[19] According to data from Knowledge Networks' 2011 Ownership Survey and Trend Report, a part of the *The Home Technology Monitor*, the number of Americans now relying exclusively on over-the-air (OTA) television broadcasting in their home increased to 45.6 million, up from 42 million one year previously. "Over-the-air TV homes increase 10% to 46 million," Rapid TV News.com, August 6, 2011.

[20] According to Nielsen NTI data, "... [w]ired cable penetration ... declined to 60.6% in May 2011 from 61.1% in May 2010 – the last time wired-cable penetration has been any lower was in November 1989," "30.9% of American TV Households Now Subscribe to Alternate Delivery, an All-Time High, While Wired Cable Hits 21-Year Low," TVB Local Media Marketing Solutions, TVB.org, June 9, 2011.

As these very recent trends suggest, there is an inherent problem that comes with charting a legal course by the ever-changing winds of technology and consumer preference. To the extent that the Court of Appeals concluded that *Pacifica* is of limited value because over-the-air broadcast content is no longer pervasive in American households, that conclusion must be rejected.

The lower court also failed to recognize the prevalence of over-the-air broadcast content that enters homes through carriage by both cable television companies and satellite services pursuant to "must carry" regulations. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992") amended the Communications Act to mandate carriage of commercial and non-commercial television broadcast signals on cable systems. Pub. L. No. 102-385, 106 Stat. 1460 (1992). Mandatory carriage of commercial broadcasts are covered by 47 USC § 534(a) which provides, in part: "each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section." The statute also defines "local commercial television station" and "qualified low power station". The FCC has no discretion in determining these definitions or the number of channels that cable operators are to devote to local stations. [21]

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[21] Must-carry obligations of cable operators were upheld in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 190 (1997) ("Turner II"), where it was noted that despite the growth of cable, "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's

Regarding mandated carriage of non-commercial broadcasts, 47 USC § 535(a) provides that "in addition to the carriage requirements set forth in section 534 of this title, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section."

Satellite systems have similar obligations, (denominated as "carry one – carry all"). Pursuant to authority under the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Pub. L. No. 106-113, 113 Stat. 1501. 47 U.S.C. § 338, *et seq*, the FCC implemented rules at 47 C.F.R. § 76.66 that require that satellite carriers which provide secondary transmission in the local market of a television broadcast station of a primary transmission of that station, "shall carry" on request "all television broadcast stations within that local market ..."

"Must carry" regulations are also relevant to this Court's "safe harbor" reasoning regarding indecency rules. In its prior decision, this Court upheld the reasonableness of a Commission rationale that the existence of "other media such as cable, justify a more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe harbor for their children." *FCC v. Fox Television Stations,* 129 S. Ct. at 1819. Because broadcast content is still a presence in the homes of a sizable number of American homes, the reasoning of *Pacifica*

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population," quoting from *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("Turner I").

still holds, and the need for a "safe harbor" still exists.

Moreover, the prevalence of broadcast content carried on cable and satellite systems through must-carry regulations is an added argument for the cogency of this "safe harbor" approach. Those parents who carefully choose "family friendly" viewing options through their cable or satellite subscriptions, and refuse to buy programs and channels that are likely to be filled with profanity or nudity or both, will have their viewing preferences countermanded if the respondents have their way in this case. This would occur because "must carry" regulations would continue to cause local broadcast content to be brought into their homes on either cable or satellite systems, while the content would then include the kind of profane, indecent fare that those parents were trying to flee.

While the Court of Appeal emasculated *Pacifica*, by noting its "narrow" and "limited" reach, those observations regarding its minimal scope are actually beside the point. This Court has determined that "we have never held that *Pacifica* represented the outer limits of permissible regulation" when it comes to indecency. *Id.* at 1815. In fact the Court of Appeals appears to concede this, concluding that it reached its First Amendment conclusions "regardless of where the outer limit of the FCC's authority lies ..." to formulate indecency rules. *Fox Television Stations*, 613 F.3d at 327.

Lastly, this Court need not utilize, let alone address, the so-called "spectrum scarcity" rationale articulated in *Red Lion Broadcasting Co., v. FCC,*

395 U.S. 367, 400-01 (1969) in order to uphold the basic logic of the *Pacifica* decision. While *Pacifica* did refer to *Red Lion*, it did so only in passing, referencing the refusal in *Red Lion* to invalidate other FCC regulations on the basis of vagueness. *Pacifica*, *supra* at 742. "Spectrum scarcity" as a doctrine has admittedly come under criticism. [22] Yet it need not be a relevant factor let alone a lynchpin here. The foundation for the constitutional aspect of the ruling in *Pacifica* was the recognition of the "uniquely pervasive presence" that television has in the average American home; and how television broadcasts are "uniquely accessible to children." *Supra* at 748, n. 26 and 749. Moreover, the FCC's authority to enforce an indecency policy that prohibits indecent speech and nudity during children's viewing hours does not depend on any particular view of the technology of broadcast "spectrum," but rather is firmly rooted in its obligation to oversee the "public interest" in broadcast communications. *Supra* at 741, n. 16.

B. The *Brown* case counsels reversal of the Court of Appeals

The ability of government to restrict those forms of indecent content that sweep minors within its reach is a narrow, but well-defined exception to the generous breadth of the Free Speech clause of the First Amendment. When this Court hews to such long-standing, and consistently applied exceptions, it

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[22] See generally: Thomas W. Hazlett, Sarah Oh, Drew Clark, *The Overly Active Corpse of Red Lion*, Northwestern Journal of Technology and Intellectual Property, Fall 2010.

also, as a necessary corollary, reinforces the breathing room created for all other speech that is protected. Overly-inventive obliteration of traditional exceptions to the First Amendment is as dangerous a judicial practice, on balance, as is the undisciplined creation of new exceptions. Both approaches evidence a Free Speech jurisprudence that has left its moorings and is drifting away from the history, and traditions that undergird the Constitution.

This Court avoided this dilemma by refusing to recognize novel exceptions to the First Amendment in its recent decisions in *Brown v. Entertainment Merchants Assn.*, 564 U.S. ___, 131 S.Ct. 2729 (2010) (refusing to uphold a new free speech exception for violent video games marketed to minors) and in *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010) (depiction – as opposed to commission – of animal cruelty held to have First Amendment protection). The legislative provisions reviewed in those cases were invalidated, not because they lacked appealing policy; but rather because they attempted to expand the traditional list of narrow exceptions to the First Amendment by carving out new categories of unprotected speech hitherto unrecognized by constitutional precedent, or by American history or tradition.

In *Brown*, the Court cited those "limited areas – such as obscenity ... incitement ... and fighting words ..." where the content of speech can be restricted; areas which represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Brown*, 131 S. Ct.

2729, 2733, quoting from *Chaplinsky v. New Hamphire*, 315 U.S. 568, 571-572 (1942).

Like obscenity, indecent content generated by broadcast stations in violation of FCC policy, is part of those "well-defined and narrowly limited classes of speech" which can be punished without offending the First Amendment. Indecent expression "surely lie[s] at the periphery of First Amendment concern." *Pacifica*, 438 U.S. at 743.

Similar to the traditional treatment of obscenity, indecency which has minors within its trajectory is also a category of expression which can be prohibited without offending the First Amendment. *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding state statute banning sale of sexually-oriented materials to minors even if it could not similarly prohibit the sale to adults); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (upholding suspension of high school student who made indecent innuendos during an assembly speech with a "captive" audience of 14-year olds, noting that "the otherwise absolute interest of the speaker in reaching an unlimited audience [may be limited] where the speech is sexually explicit and the audience may include children;" and *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (school board may remove books in public school library that are "vulgar").

This Court's most current Free Speech jurisprudence strikes a prudent balance between those handful of well-established, narrowly drawn categories of expression that can be forbidden based on content (including indecency and obscenity), and

the wide range of all other expression that cannot. The FCC's policy follows that balance, and should be upheld.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

CRAIG L. PARSHALL
Counsel of Record
GENERAL COUNSEL,
NATIONAL RELIGIOUS
BROADCASTERS
9510 Technology Dr.
Manassas, VA 20110
cparshall@nrb.org
(703)330-7000

JOSEPH C. CHAUTIN III
ELISE M. STUBBE
HARDY, CAREY, CHAUTIN &
BALKIN, LLP
Co-Counsel
1080 West Causeway
Approach,
Mandeville, LA 70471
(985)629-0777

Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PARENTS TELEVISION COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBERT R. SPARKS, JR.
Counsel of Record
CHRISTOPHER T. CRAIG
SPARKS & CRAIG LLP
6862 ELM STREET
SUITE 360
MCLEAN, VA 22101
(703) 848-4700
rrsparks@sparkscraig.com

Counsel for Amicus Curiae

September 14, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. Respondents' Free and Exclusive Use Of the Public Airwaves Is A Public Trust 6

II. Broadcasting is a Uniquely Pervasive Medium 6

III. The FCC's Enforcement Regime Is A Response To The Increasingly Coarse Content On Broadcast Television .. When Children Are Most Likely to Be Watching 9

IV. V-Chip Technology is Not a Substitute For Broadcasters' To Avoid Indecent Broadcast Material Obligation When Children Are Most Likely To Be Watching Television 12

Table of Contents (Cont.)

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Brown v. Entertainment Merchants Association,
131 S. Ct. 2729 (2011) 15

CBS, Inc. v. FCC,
453 U.S. 367 (1981) 6

FCC v. Fox Television Stations, Inc.,
129 S. Ct. 1800 (2009) ..... *passim*

FCC v. Pacifica Foundation,
438 U.S. 726 (1978) ..... *passim*

Frisby v Schultz,
484 U.S. 474 (1988) 14

Ginsberg v. New York,
390 U.S. 629 (1968) 3

Rowan v. United States Post Office Dept.,
397 U.S. 728 (1970) 14

Turner Broadcasting Sys. Inc. v. FCC,
512 U.S. 622 (1994) 6

United States v. Southwestern Cable Co.,
392 U.S. 157 (1968) 6

Statutes and Regulations

5 U.S.C. §551, *et seq.* 4

18 U.S.C. § 1464 ..... *passim*

Public Telecommunications Act of 1992, §16(a), 106 Stat. 954 6

Broadcast Indecency Enforcement Act of 2005, Public Law No. 109-235, 120 Stat. 491 17

47 C.F.R. 73.3999(b) 2

Miscellaneous

Citizen's Complaint Against Pacifica Found. Station WBAI(FM), 56 F.C.C 2d 94 (1975) 3

Home Technology Monitor 2011 Ownership Survey and Trend Report 7, 8

Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, 24 F.C.C.R. 11413 (2009) 16

National Association of Broadcasters Press Release 7,8

Parents, Children & Media: A Kaiser Family Foundation Survey (June 2007) 16

Miscellaneous (Cont.)

PTC Study: *Children Assaulted by Sex, Violence, Drugs and Explicit Language on BET and MTV (2008)* 9,10

PTC Study: *Basic Cable Awash in Raunch: A content analysis of expanded basic cables Original Prime-Time series (2004)* 9

PTC Study: *Habitat for Profanity: Broadcast TV's Sharp Increase in Foul Language (2010)* 11

Citizens for Change Report: *Enough is Enough* 10

Web Sites Showing Cable Ownership by Fox and ABC 2

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Parents Television Council (PTC) is a nonprofit, nonpartisan, grassroots organization dedicated to improving the content of entertainment programming, with an emphasis on prime time television. Founded in 1995, PTC is funded by contributions from its 1.3 million members and other supporters throughout the United States. It works with television producers, broadcasters and sponsors in an effort to stem the increasing tide of harmful messages targeted at children.

PTC has encouraged elected and appointed government officials and agencies to enforce broadcast decency standards that exist in statute and regulation, and it has encouraged its members and others to file complaints with the FCC about broadcasts they believe violate the indecency law, including the broadcasts at issue in this case. Many of the complaints filed with the FCC about the 2002 and 2003 Fox broadcasts at issue in this case came from PTC members. PTC also participated as *amicus curiae* in the Second Circuit proceeding

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[1] As required by Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties have consented in writing to the filing of this brief.

below, and as *amicus curiae* in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

STATEMENT OF THE CASE

PTC adopts the Petitioners' Statement.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCC's enforcement regime does not affect *whether* respondents can broadcast expletives or titillating bathroom scenes involving children and nude women; it is about *when* they can do so. The FCC's enforcement efforts are aimed only at channeling indecent broadcasts away from the 6 a.m. to 10 p.m. time period. 47 C.F.R. 73.3999(b). Fox, ABC and the other respondents are free to broadcast whatever they want (as long as it is not obscene) on over-the-air television between 10 p.m. and 6 a.m.

They are also free to broadcast the same language and the same bathroom scene at issue here at any time on any of the dozens of cable channels they own.[2] Petitioners therefore cannot realistically claim that simply channeling indecent broadcasting to the hours after 10 p.m. somehow chills their speech when they own so many other avenues for speech, particularly when strong Congressional

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[2] See, for example, the list of cable channels owned by Fox and ABC at: For Fox: http://www.newscorp.com/operations/cable.html; For ABC: http://corporate.disney.go.com/careers/who_abc_cable.html.

policy and this Court's holdings show that the protection of children from broadcast indecency is of paramount importance.

The Commission's enforcement regime therefore addresses only a portion of respondents' broadcast fare on the public airwaves. It requires only that respondents restrain themselves during the times when children are most likely to be watching television. That was a reasonable restriction in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and it is still reasonable, for in *Pacifica* this Court held that the government's interest in the well-being of its youth justified the regulation of otherwise protected speech. *Id.* at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (quotations omitted).

The Commission's regime is bottomed on 18 U.S.C. § 1464, a statute that has been on the books since the 1930s, and it uses a definition of indecency that has been in place since 1975. 56 F.C.C. 2d 94, 98. Almost 34 years ago, *Pacifica* effectively sanctioned the Commission's definition of indecency and since then, using the public airwaves, respondents and other broadcasters have profited handsomely without running afoul of the Commission's indecency policies and guidelines.

Several years ago, the Commission expanded the scope of its indecency enforcement activity to reach the single use of expletives on broadcast television. In addition, it began to police the racy material broadcast in scripted programming.

Respondents and other broadcasters launched an array of objections to the FCC's new enforcement regime, among them a claim that it violated the Administrative Procedure Act, 5 U.S.C. §551, *et seq.* (APA).

This Court affirmed the Commission's current enforcement regime, holding that the FCC's decision to expand the scope of its enforcement activity to reach the single use of expletives on broadcast television was entirely rational and therefore lawful under the APA. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). What the Court called the "pervasiveness of foul language and the coarsening of public entertainment in other media such as cable," justified the Commissions' new policy of more closely regulating broadcast programming in order that concerned parents need not worry that their children would see and hear on broadcast television the kind of increasingly coarse fare carried on cable. 129 S. Ct. at 1819. The Court also noted that "Congress has made the determination that indecent material is harmful to children and has left enforcement of the ban to the Commission." *Id.* at 1813.

Respondents have been granted the free and exclusive use of the public airwaves. Their broadcasts dominate public entertainment. For example, in sports, they broadcast NFL games, the Super Bowl, the NCAA Final Four, the World Series, the Masters Golf Tournament and the Kentucky Derby. In popular entertainment, they broadcast Dancing With the Stars and American Idol, to name

only two hugely popular shows. In return for their privileged position in the broadcast arena, they are required to observe Section 1464's stricture against broadcast indecency. They have not done so.

In this case, they seek complete immunity to broadcast expletives of the kind broadcast by Fox two years in a row on the same show. ABC contends that it did nothing wrong in broadcasting in prime time an episode of NYPD Blue that included a scene in which a young boy walks in on a nude woman in the bathroom. The episode's lighting, sultry music and lingering shots of the woman's buttocks prove otherwise. Simply put, respondents want out from under the indecency regime. For them, the free use of the public airwaves is about their rights, but not about their responsibilities.

The FCC's current enforcement regime is a response to respondents' increasingly aggressive probing of the limits of what they can broadcast. Respondents argue that those who do not want to watch what they broadcast should use technology to avoid it, putting the burden on the viewing public, which owns the airwaves, to avoid offensive material. Even if such technology worked and it does not, in part because respondents mislabel their broadcasts – it is respondents, not their audience, who are obliged to take steps to avoid broadcasts of indecent material.

ARGUMENT

I. Respondents' Free And Exclusive Use Of The Public Airwaves Is A Public Trust

There should be no dispute that those who have been granted a license to broadcast over scarce public airwaves serve in a sense as a fiduciary for the public. In *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), this Court noted that "[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."

As part of the public trust granted to broadcasters in exchange for their free and exclusive use of the public airwaves, they are required to abide by the Congressional prohibition against indecent broadcasts, which applies only during the hours of 6 a.m. to 10 p.m. *Fox*, 129 S. Ct. at 1806, citing 18 U.S.C. § 1464 and the Public Telecommunications Act of 1992, §16(a), 106 Stat. 954.

II. Broadcasting Is a Uniquely Pervasive Medium

The Court has observed in another context that "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)). Recent studies show

that by any measure broadcast television is *still* a uniquely pervasive influence in America.

In 2003, the FCC found that more than 15 million households relied exclusively on broadcast television, rather cable or satellite service. Pet. App. 79a-80a, ¶ 49. In addition, the FCC found, in 2003 some 68% of children between the ages of eight and 18 had a television set in their bedrooms, and almost half of those received only broadcast content. *Id.*

The numbers of those who get only broadcasting, rather than cable, has substantially increased since the Commission's 2003 findings. The National Association of Broadcasters (NAB) announced just a few months ago that the number of those who rely solely on broadcast television has tripled (to 46 million, amounting to 15% of the television-watching public).[3] Other research has shown that a quarter of Asian-American households, 23% of Spanish-speaking households and 17% of African-American homes rely solely on over-the-air broadcast television. Home Technology Monitor 2011 Ownership Survey and Trend Report.[4] Overall, some 20% of adults in the 18-34 year old demographic get only broadcast television. *Id.*

The NAB also recently bragged that over 90 of the top 100 primetime shows on television are on

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[3] http://missouri-news.org/opinion/whats-the-best-use-of-broadcast-airwaves/6720

[4] http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsLang=en&newsId=20110606006638&div=-1063439563

broadcast television, including NFL games, the NCAA Final Four, the World Series, the Masters and the Kentucky Derby.[5] The NAB failed to mention that popular hits like American Idol and Dancing With the Stars are also on broadcast television. In September 2006, each of the top ten broadcast programs had more than 15 million viewers; only one cable program had even 5 million viewers. Pet. App. 80a ¶ 50. During the 2004-2005 season, of the 495 most-watched programs, 485 of them were on broadcast television and the highest-rated cable program rated only 257 on the list of most-watched programming. *Id.* With broadcasting that far ahead of all other televised entertainment, it is safe to say that it is not only pervasive, it is also uniquely pervasive – and it is uniquely accessible to children.

Simply put, broadcast programming saturates the nation's airwaves and dominates what is seen and heard in the nation's homes, particularly by children. That is why, despite their claims that they are besieged on all sides by viewing and listening alternatives on cable, the internet and elsewhere, none of the broadcasters has chosen to abandon the free public airwaves.

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[5] See the businesswire.com article at n.4, *supra*.

III. The FCC's Enforcement Regime Is A Response To The Increasingly Coarse Content On Broadcast Television When Children Are Most Likely To Be Watching

In *Fox*, this Court noted "the pervasiveness of foul language and the coarsening of public entertainment in other media such as cable. . . ." 129 S. Ct. at 1819. The same can be said of broadcast television as well. For studies of cable and broadcast content show that cable is a leading indicator of what is to come in broadcasting.

PTC published a November 2004 report entitled, *Basic Cable Awash in Raunch: A content analysis of expanded basic cables Original Prime-Time series.*[6] There, PTC compiled a 16-page manuscript of dialog and stage directions culled from basic cable television programming on the air at the time. The 2004 programming had it all: all seven dirty words discussed in *Pacifica*, and graphic sexual content, including explicit dialog, strippers, nudity, masturbation and oral sex.

By 2008, it was worse. That year, PTC released another study of basic cable fare, *Children Assaulted by Sex, Violence, Drugs and Explicit Language on BET and MTV,*[7] conducted in

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[6] PTC's 2004 report is at: http://www.parentstv.org/PTC/publications/reports/2004cablestudy/print.pdf

[7] The 2008 report is found at: http://www.parentstv.org/PTC/news/release/2008/0410.asp.

conjunction with Enough is Enough, a campaign protesting the commercialization and marketing of negative and derogatory images of black men and women in the entertainment industry, sponsored by Citizens for Change, Inc.[8] PTC's study analyzed adult content airing on BET's Rap City and 106 & Park and on MTV's Sucker Free on MTV for a two-week period in December 2007 during afternoon or early evening hours when children were at home after school, and in March 2008. The latter period showed even higher levels of adult content in March 2008 than in December 2007. For example, PTC found:

- 746 sexually explicit scenes or lyrical references in the 27.5 hours of analyzed programming from the December study period for an average of 27 instances per hour, or one instance every 2.2 minutes. Sexual content was even more common in the March test period, with an average 40 instances per hour, or one instance every 90 seconds;

- 475 uses of explicit language and obscene gestures in December for an average of 17 instances per hour, or one instance every 3.5 minutes, and 495 uses of explicit language and obscene gestures in March, for an average of 35 instances per hour, or one instance every 1.7 minutes.

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[8] www.enoughisenoughcampaign.com

Last year, PTC conducted a study comparing the first two weeks of the 2010 season's primetime broadcast programming with the same period in 2005, with a focus on the volume and harshness of profanity occurring on broadcast television. See *Habitat for Profanity: Broadcast TV's Sharp Increase in Foul Language.*[9]

PTC found that:

- The use of profanity on prime-time broadcast entertainment programming increased 69.3% from 2005 to 2010;

- The largest increases were found in the use of what the Report referred to as the "harshest profanities," and in explicit references to genitalia and bodily functions;

- The greatest increase in the use of the harshest profanities occurred in the 8 p.m to 9 p.m ET time period, which is also known as the Family Hour;

- Use of the word "fuck," whether bleeped or muted, increased from 11 instances in 2005 to 276 instances in 2010 – including a ten-fold increase in the use of that word during Family Hour. Use of the word "shit" was used in bleeped or muted form 11 times in 2005; by 2010 it was used 95 times. That count does

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[9] PTC's complete study, with data, results and analysis is at: http://www.parentstv.org/PTC/publications/reports/2010ProfanityStudy/study.pdf.

not included the coy use of "shit" in the title of the CBS show, *$#*! My Dad Says,* or NBC's scripted, unbleeped use of the word in a recent broadcast of *30 Rock*. At 3;

- Use of the word "balls" to refer to male genitalia increased 200%, use of the word "screw" increased 121%, and use of the word "boobs" in reference to breasts increased 90%. *Id.*

The study noted a 69% increase in scripted profanity on pre-planned, filmed entertainment, showing that use of such language by the networks is both deliberate and pervasive.

If the Commission's enforcement regime is struck down, there will soon be little difference between cable and broadcast content, and the public airwaves will afford no shelter for parents who want to shield their children for as long as they can from the corrosive effects of what broadcasters think is appropriate.

IV. V-Chip Technology Is Not a Substitute For Broadcasters' Obligation To Avoid Indecent Broadcast Material When Children Are Most Likely To Be Watching Television

Those who contend that viewers who want to avoid indecent broadcasting should use a technology filter have it backwards. The FCC's enforcement regime is bottomed on Section 1464, which addresses

broadcasting, not receiving. That statute should not be ignored by making viewers fend for themselves so that broadcasters can have a free hand with the public airwaves.

By putting the onus of Section 1464 on the broadcasters, Congress chose the simplest and most direct way of addressing the problem of broadcast indecency. Congress did not leave the viewing public to look out for itself. A technological solution at the viewers' end – if it worked, and it does not - shifts the problem of broadcast indecency from the broadcasters to the public, and effectively reverses the power flow of Section 1464 from a restriction on broadcasters to a burden on viewers and listeners.

There are several reasons why technology does not trump the indecency statute.

1. V-chip and similar technology touted by respondents and their supporters address only video broadcasts, yet section 1464 and the Commission's enforcement regime apply to both television and radio broadcasts. There is no technology available to radio listeners that would permit them to avoid indecent material.

2. A purported technology "solution" burdens viewers, leaving respondents, who have free use of a public resource, unfettered by any restraints at all in what they can broadcast, and when. That turns the Congressional regulatory scheme on its head.

This Court in *Pacifica* noted the intrusive nature of broadcasting, commenting that it comes into the privacy of the home, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748.[10] The Court has made the same point in other cases. See *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970) (right to avoid unwelcome speech has special force in the privacy of the home); and *Frisby v Schultz*, 484 U.S. 474, 485 (1988) ("We have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom").

As to the Fox broadcasts, those observations are particularly apt here. As noted above, the ratings that Fox assigned to the 2002 and 2003 broadcasts were inadequate to warn parents that their children were at risk of being subjected to gratuitous expletives and semi-nudity on prime time television. There is no reason why viewers should have to filter broadcasters' fare against indecency, and every reason why the broadcasters should do the job themselves, as Congress intended.

3. The technology available to viewers is not an effective bulwark against indecent broadcasting.

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[10] In his concurrence in *Pacifica*, Justice Powell put it this way: "broadcasting – unlike most other forms of communication – comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds." 438 U.S. at 759 (citations omitted).

It is only as good as the rating system it is based on, and that system is bad.

The best evidence of that is the inaccurate TV-PG underrating Fox gave to its 2002 and 2003 Billboard Music Awards broadcasts. See *FCC Order*, Pet. App. 92a and 82a. Inaccurate rating of television programming is not at all uncommon, and may be driven by economic incentives, since programs with more restrictive ratings command lower advertising revenues. *Id.* at 82a-84a, n.162.

In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), this Court struck down California's prohibition on sale of violent video games to those under the age of 18. In doing so, it was important to the Court that the video-game industry had in place an efficacious ratings system backed up by point-of-sale enforcement by merchants that resulted in a significant reduction in the number of minors able to buy violent video games *Id.* at 2740-2741. The same cannot be said here. As shown above, the broadcasters' rating system is a slapdash affair, unevenly applied and often driven by commercial concerns, rather than an honest effort to alert viewers to the true content of broadcasts. As a consequence, some 2.5 million minors saw the two Fox Billboard Music Awards shows at issue in this case. *Fox*, 129 S. Ct. at 1809.

A different point, but just as damning for the broadcasters' rating system, is the fact that, as the FCC Order noted, the "TV-PG" rating is the most common rating given by the broadcasters to their

programming, covering a majority of programming. That rating means that a program may contain material that parents find unsuitable for younger children, and that parents may want to watch that program with their children. Pet. App. 50a-51a, n.47 If the broadcasters have accurately rated their programming, then by their own estimation, the majority of what they broadcast must be watched with caution by children. That is a telling indictment of what the broadcasters are sending into the nation's living rooms.

4. Viewers do not understand the ratings system. Apart from the broadcasters' consistent mislabeling of the content of their broadcasts, ignorance among viewers of the ratings system and v-chip technology makes the v-chip particularly useless as a safeguard against broadcast. For example, among parents who have even heard of the broadcasters' ratings system, fewer than half understand what the ratings mean. See *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 F.C.C.R. 11413 (2009). A 2007 Kaiser Family Foundation study cited in the Commission's report found that only 16% of parents had used the v-chip.[11]

5. The broadcasters have at hand technology that readily permits them to avoid spontaneous vulgarities of the kind uttered in the 2002 and 2003 Billboard Music Awards Shows. See *Fox*, 129 S. Ct.

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[11] *Parents, Children & Media: A Kaiser Family Foundation Survey* (June 2007) at 9.

at 1813 ("The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission's stepped-up enforcement policy"). Broadcasters can and should use technology at their end, by delaying the broadcast of live events 10 seconds or so, or however long is necessary, in order to ensure that they do not run afoul of their obligations under Section 1464. If broadcasters took their obligations seriously, they would do so already for the broadcast of award shows which have proven to be unpredictable and troublesome.

Section 1464, which underpins the FCC's enforcement regime, is not a dead letter. The ever coarser fare broadcast over the public airwaves during the day and in prime time prompted Congress, over the objection of the broadcasters, to put real teeth in the statute when it significantly increased the penalty for broadcast indecency. *See* Broadcast Indecency Enforcement Act of 2005, Public Law No. 109-235, 120 Stat. 491. Respondents should not be allowed to end-run Congress by placing the burden on parents to try to protect their children against exposure to what this Court, quoting *Pacifica*, rightly characterized as material "at the periphery of First Amendment concern." *Fox*, 129 S. Ct. at 1819.

CONCLUSION

Broadcasters are not unfairly put upon by not being able to broadcast whatever they want until after 10 p.m. each day. Nor are they really at a competitive disadvantage with cable; they own significant portions of the cable spectrum and therefore control and sometimes even create the very cable content that they contend so disadvantages them as broadcasters. They cannot with a straight face point to their often coarser fare on cable as a reason to permit them to do the same on broadcast television.

This case is not an affront to artistic expression or a threat to the First Amendment. Instead, it is about whether Section 1464 is to have any continuing vitality in affecting what the broadcasters can send into America's homes, or whether, as respondents seem to argue, the indecency statute is a polite fiction that can be safely ignored.

Technology cuts both ways. There is no reason why the broadcasters cannot impose a brief time delay in their live broadcasts in order to avoid unscripted vulgarities. After all, Fox's 2002 and 2003 broadcasts were delayed by one hour in the Mountain time zone and three hours in the Pacific time zone. Pet. App. 68a ¶ 36. A 10-second delay should not be an onerous burden in order to give meaning to Section 1464.

The Court should uphold the FCC's new enforcement policy contained in the Remand Order as constitutionally valid as a logical extension of the holding of *Pacifica*.

Respectfully Submitted,

Robert R. Sparks, Jr.
Counsel of Record
Christopher T. Craig
Sparks & Craig, LLP
6862 Elm Street, Suite 360
McLean, Virginia 22101
(703) 848-4700
rrsparks@sparkscraig.com
Counsel for *amicus curiae*
Parents Television Council

AMICUS CURIAE BRIEF

RECORD
A
BRIEF

No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICI CURIAE BRIEF OF THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT AND THE MARION B. BRECHNER FIRST AMENDMENT PROJECT IN SUPPORT OF RESPONDENTS

ROBERT D. RICHARDS
Counsel of Record
THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT
308 James Building
University Park, PA 16802
(814) 863-1900
rdr2@psu.edu

CLAY CALVERT
MARION B. BRECHNER FIRST AMENDMENT PROJECT
2060 Weimer Hall
Gainesville, FL 32611
(352) 273-1096
ccalvert@jou.ufl.edu

Counsel for Amici Curiae

November 7, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library

TABLE OF CONTENTS

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Federal Communications Commission's Rationale for Its Broadcast Indecency Policy Raises Serious Constitutional Issues and is Contradicted by Its Current Enforcement Regime 5

A. The FCC's Underlying Rationale for Punishing Broadcasters for Indecent Content Pivots on Shielding Minors from the Repeated Use of Expletives, Not Isolated Instances of Fleeting Expletives 5

B. Exceptions to the FCC's Broadcast Indecency Policy Contradict the FCC's Own Rationale of Protecting Minors and Render the Current Policy Fatally Underinclusive 11

II. The Government Lacks Proof of Any Harm to Minors Caused by Hearing Fleeting Expletives on the Broadcast Medium, and Its Indecency Enforcement Regime Provides an Underinclusive Remedy for Curing Any Harm, Even If It Did Exist 17

CONCLUSION 22

TABLE OF AUTHORITIES

CASES:

Brown v. Entm't Merchants Ass'n,
131 S. Ct. 2729 (2011) 4, 16, 17, 21

Cohen v. California,
403 U.S. 15 (1971) 10

FCC v. Fox Television Stations, Inc.,
129 S. Ct. 1800 (2009) 20

FCC v. Pacifica Found.,
438 U.S. 726 (1978) 9, 10, 11, 15, 18

Interactive Digital Software Ass'n v. St. Louis County,
329 F.3d 954 (8th Cir. 2003) 21

ADMINISTRATIVE DECISIONS:

Citizens Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y.,
56 F.C.C.2d 94 (1975) 7, 8, 9

Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"
20 F.C.C.R. 4507 (2005) 14, 15

Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005,
21 F.C.C.R. 2664 (2006) 13

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,
FCC Docket No. 06-166 (Nov. 6, 2006) 14

Pacifica Found., Inc., d/b/a Pacifica Radio, Los Angeles, Calif.,
2 F.C.C.R 2698 (1987) 13

Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Found., Station WBAI (FM), New York, N.Y.,
59 F.C.C.2d 892 (1976) 11, 12

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24 F.C.C.2d 408 (1970) 6, 12

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Timothy Jay, *The Utility and Ubiquity of Taboo Words*, 4 Persp. on Psychol. Sci. 153 (2009) . . 20

INTERESTS OF *AMICI CURIAE*[1]

The Pennsylvania Center for the First Amendment ("PaCFA") was established by The Pennsylvania State University to promote awareness and understanding of the principles of free expression to the scholarly community, the media and the general public. Directed by attorney Robert D. Richards, the PaCFA's members publish books and scholarly articles on First Amendment topics. The PaCFA regularly tracks issues related to free expression, and research generated from those projects is presented at national conferences and in law journals.

The Marion B. Brechner First Amendment Project ("Project") is a nonprofit, non-partisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition and freedom of thought.

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[1] Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Federal Communications Commission (hereinafter "FCC" or "Commission") historically reserved its indecency policy enforcement for only the most extreme broadcasts. Programs that contained repeated offensive language or dwelled upon sexually explicit themes were subject to FCC sanctions – and then only if audience members complained and if the Commission agreed the broadcasts reached a certain level of explicitness and shock value. This Court ratified the Commission's authority in 1978 to act in this regard, consistent with the Constitution, but it cautioned the FCC to use its powers sparingly to protect children and unwitting adults from exposure to a barrage of unwelcome material.

Indeed, shielding children from language the FCC finds inappropriate for young ears has been the government's paramount concern from the outset of this regulatory enforcement. For more than four decades, the cases decided by the FCC have factored in how accessible broadcast technology is to children and how the offending content could reach that segment of the audience by a simple turn of the dial.

In recent years, the Commission veered away from imposing indecency regulations solely on shows that dwell upon or repeat material that is more suited for adults in favor of a new enforcement regime that also punishes the unscripted and unexpected – or fleeting – expletive. This new policy raises significant First Amendment concerns, which render it fatally flawed under the Constitution.

If the impetus behind indecency regulations is the protection of children, as the FCC has made clear throughout history, then the current regulatory structure is fatally underinclusive and cannot survive a constitutional challenge. The Commission has been consistent, in practice, to carve out exemptions for bona fide news and public affairs broadcasts from indecency proscriptions and even has protected entertainment shows and movies where the otherwise indecent content is pivotal to the artistic sensitivity of the program.

On the one hand, that helps the Commission avoid an intractable First Amendment challenge that the government has strayed too far into editorial discretion and content decisions. On the other hand, it creates a gaping exception that swallows both the viability and alleged purpose of the rule. If children actually are harmed by exposure to indecent language – *amici* illustrate in Part II there is, in fact, absolutely no causal evidence of any harm whatsoever – then it should not matter if they heard that language during a newscast interview or in artful TV movie dialogue. It is the language itself, rather than its distribution vehicle, that purports to be harmful. That very point raises another constitutional infirmity.

The Commission has long supposed that a child's exposure to indecent language is harmful, yet it has never required any evidence that this truly is the case. In fact, as *amici* argue in Part II, there is no evidence of harm to minors caused by hearing an isolated or fleeting broadcast expletive. That is highly problematic – indeed, fatal – because in its last term, this Court endorsed a much more demanding standard of harm causation when the government alleges that

particular content is injurious to minors. In *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), the Court refused to accept California's position that minors' exposure to video game violence was harmful to their psychological and physiological development, absent any direct proof that such exposure *causes* harm. The majority warned that "ambiguous proof will not suffice." *Id.* at 2739. In the instant case, the record is devoid of *even* ambiguous proof.

For decades, the Commission has operated upon a mere supposition that exposure to indecent language somehow harms a child. Under the standard articulated by this Court in *Brown*, supposition alone is not constitutionally sufficient. The *Brown* Court rejected social science evidence that pointed only toward a correlation between exposure to video game violence and subsequent harm and made abundantly clear that only causal evidence of harm will suffice when a First Amendment interest is at stake.

In the instant case, the FCC has not demonstrated even a direct correlation of harm, yet alone the required threshold of causation. If no proof can be shown that a child's exposure to protracted and repeated instances of indecent language is detrimental, then it is inconceivable that a momentary exposure to a fleeting expletive will result in any harmful effects. If the government wishes to maintain that position, it must provide causal evidence to survive this constitutional challenge. A hunch theory of harm must not be allowed to trump the First Amendment right of free speech.

ARGUMENT

I. The Federal Communications Commission's Rationale for Its Broadcast Indecency Policy Raises Serious Constitutional Issues and is Contradicted by Its Current Enforcement Regime

This part has two sections. Section A illustrates how the FCC's current indecency enforcement regime strays too far from its long-time justification for punishing broadcasters airing indecent content. Section B then demonstrates how the FCC's *de facto* indecency exemptions provided to news and artistic expression – setting aside the definitional problems associated with the categories, such as how news is defined – fly squarely in the face of what the FCC has long touted as the underlying rationale for broadcast indecency policy, namely, the protection of children.

A. The FCC's Underlying Rationale for Punishing Broadcasters for Indecent Content Pivots on Shielding Minors from the Repeated Use of Expletives, Not Isolated Instances of Fleeting of Expletives

For much of its history, the FCC limited its enforcement of broadcast indecency policies to the most egregious cases using repeated expletives. Beginning in the 1970s, the FCC stepped up its policing of the airwaves when the use of indecent language was so pervasive in a particular broadcast as to raise concerns from listeners. In January 1970, for instance, Jerry Garcia, leader of the rock band "The Grateful Dead," recorded an interview in a hotel room with two representatives of a Philadelphia radio

station. When the 50-minute interview aired, Garcia's "comments were frequently interspersed with the words 'f - - k' and 's - - t,' used as adjectives, or simply as an introductory expletive or substitute for the phrase, et cetera." *WUHY-FM, E. Educ. Radio,* 24 F.C.C.2d 408, 409, ¶ 3 (1970).

Although the FCC emphasized, in its Notice of Apparent Liability, "the licensee's right to present provocative or unpopular programming which may offend some listeners," the sheer frequency of the verbal barrage in this interview brought about, on the part of the Commission, "a duty to act to prevent the widespread use on broadcast outlets of such expressions." *Id.* at 410, ¶ 6-7. Central to the FCC's analysis was the fact that, although stations have target audiences, many who are not the intended listeners "may also see or hear portions of the broadcast," and "in that audience are very large numbers of children." *Id.* at 411, ¶ 8. By its very nature, a broadcast program "comes directly into the home and frequently without any advance warning of its content." *Id.* The Commission recognized the practice of what today is often called "channel surfing," or as the FCC then described it: "Millions daily turn the dial from station to station." *Id.*

In fact, the notion that listeners might come across offensive language and, as a result, change their media consumption habits, greatly troubled the Commission, which wrote: "Very substantial numbers would either curtail using radio or would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program." *Id.* The chances of listeners accidentally coming across offensive language on the broadcast

airwaves are greatly enhanced, of course, when that language permeates the program in question. The odds, in contrast, are minimal when a channel surfer flips through an hour-long program involving an isolated expletive.

Again, it was the youngsters in the audience that prompted special attention, as the FCC noted, "[n]o one would could ever know, in home or car listening when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism." *Id.*

Five years later, the Commission lamented that "the problem has not abated and the standards set forth apparently have failed to resolve the issue." *Citizens Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y.*, 56 F.C.C.2d 94 (1975). This time the culprit was another popular cultural figure, comedian George Carlin, and his so-called "Filthy Words" monologue. A listener, while driving his car during the middle of the afternoon, heard the broadcast, which included the words, "cocksucker," "fuck," "cunt" and "shit." *Id.* at 95, ¶ 3. The listener noted in his complaint to the FCC that "[a]ny child could have been turning the dial, and tuned in to that garbage." *Id.* His complaint went on to report that "Incidentally, my young son was with me when I heard the above..." *Id.*

The fact that a child was listening to the station was anything but incidental to the FCC's resolution to the case. The Commission spelled out four considerations as to why "[b]roadcasting requires special treatment" *Id.* at 97, ¶9:

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference (citation omitted); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children (footnote omitted). *Id.*

Indeed, bookending the references to children in the audience clearly telegraphed the Commission's rationale for ruling against the Pacifica Foundation. The Commission's declaratory order stressed that "it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troubling part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear." *Id.* at 98, ¶ 11. Moreover, the analysis of what is considered "indecent," according to the FCC, revolves around this very issue. As the Commission observed,

> the concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that

> children may be in the audience. *Id.* (footnote omitted).

When the case ultimately reached the U.S. Supreme Court, the issue essentially was narrowed to the facts of the case, and the question became "whether the First Amendment denies the government any power to restrict the public broadcast of indecent language in any circumstances." *FCC v. Pacifica Foundation*, 438 U.S. 726, 744 (1978). As the Court went on to suggest, "For if the government has any such power, this was an appropriate occasion for its exercise." *Id.* Indeed, the Court found the FCC had that authority and exercised it appropriately in this case. Two points were critical to the Court's ruling in *Pacifica* and merit some elaboration.

First, the Court focused on the pervasive nature of broadcasting and noted that it enters into the privacy of the home. For that reason, special considerations have to be given to what might be an unwanted guest, as the Court observed:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place. *Id.* at 748-749 (footnote omitted).

Second, as the FCC had done in previous decisions, the Court honed in on the fact that children were in the audience, noting that "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. The Court suggested that exposure to such language could result in detrimental effects, writing: "Although Cohen's written message[2] might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." *Id.*

The Court concluded, importantly, by emphasizing "the narrowness of our holding." *Id.* at 750. For instance, in discussing "the telecast of an Elizabethan comedy," the Court specifically observed that it had "not decided that an occasional expletive...would justify any sanction." *Id.*

Indeed, both the Jerry Garcia and George Carlin broadcasts involved the repeated use of indecent language where the odds of a channel-surfing child hearing and learning such language is greatly exacerbated. To the extent that the FCC's traditional rationale for protecting minors is grounded largely in protecting minors from offensive language, that rationale is severely undermined by targeting programs that involve only fleeting expletives where

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[2] The reference here is to Paul Robert Cohen, the petitioner in *Cohen v. California*, 403 U.S. 15 (1971) who, during the height of the Viet Nam War, walked into a Los Angeles, Calif. courthouse sporting a jacket that contained the message, "Fuck the Draft." The Court ruled in his favor on First Amendment grounds and famously uttered that "it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* at 25.

the odds of a child accidentally hearing and learning such language are greatly reduced.

B. Exceptions to the FCC's Broadcast Indecency Policy Contradict the FCC's Own Rationale of Protecting Minors and Render the Current Policy Fatally Underinclusive

Shortly after the FCC released its declaratory order in *Pacifica*, the Radio Television News Directors Association (RTNDA) sought clarification from the Commission as to what effect the ruling would have on "the broadcasting of indecent words which might otherwise be reported as part of a bona fide news or public affairs program." *Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Found., Station WBAI (FM), New York, N.Y.*, 59 F.C.C.2d 892, ¶ 3 (1976). Specifically, the RTNDA raised the possibility of voice and video actualities of "angry political demonstrations and even more structured political debate, interviews and conversations." *Id.*

The news directors organization was rightfully concerned that the FCC's *Pacifica* ruling would "cause licensees to censor programming and this would 'not only have a deleterious impact on accurate and insightful reporting in sporadic incidents, but would tend to impact over the long run most heavily on news coverage of those persons who, for whatever reason..., regularly and publicly use language which a majority of the public considers to be indecent.'" *Id.* at 893, ¶ 3.

The Commission sought to alleviate the fears of broadcasters by saying its *Pacifica* order "was issued

in a specific factual context" and that it shared "petitioner's concerns that we must take no action which would inhibit broadcast journalism." *Id.*, ¶ 4. In a footnote, the Commission addressed the RTNDA's concern that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Id.*, n. 1. The FCC opined that "[u]nder these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language." *Id.*

And, once again, the Commission reiterated the bottom-line rationale for its policy, writing, "By our order we sought primarily to protect young children from sexually explicit language." *Id.* at 893, ¶ 4. In fact, the Commission had hinted at that approach in its early decision regarding the Jerry Garcia interview. In that decision, the FCC noted that the issue presented did "not involve presentation of a work of art or on-the-spot coverage of a bona fide news event." *WUHY-FM*, 24 F.C.C.2d at 410, ¶ 6.

Herein lies an inherent and illogical contradiction that continues to threaten underlying First Amendment principles. On the one hand, the Commission has steadfastly adhered to its position that the protection of children is paramount. In a subsequent case, coincidentally also involving the Pacifica Foundation, the Commission observed that the

> physical separability of adults from children, however, is generally not available in broadcasting. Broadcast material is available to anyone who has a radio or television. Accordingly, the only effective means of

> restricting the access of minors to indecent programming is to channel such programming to a time during which there is not a reasonable risk that children may be in the audience. *Pacifica Found., Inc., d/b/a Pacifica Radio, Los Angeles, Calif.*, 2 F.C.C.R 2698, 2699 ¶15 (1987).

On the other hand, the Commission's longstanding practice has been to exempt bona fide news programs and artistic expression from the indecency prohibitions. This practice was evidenced most recently in two cases presented to the Commission on indecency complaints. One involved "The Early Show," a CBS network morning news and interview program, and the other concerned the broadcast of the acclaimed motion picture, "Saving Private Ryan" by several ABC Television affiliates.

In the "The Early Show" case, a viewer filed a complaint against CBS affiliate KDKA-TV, in Pittsburgh, Pa. During a live interview with Twila Tanner, a cast member of the CBS show "Survivor: Vanuatu," she "described a fellow contestant this way: "I knew he was a bullshitter from Day One." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005*, 21 F.C.C.R. 2664, 2698, ¶137, n.199 (2006). In its initial ruling in the case, the FCC found that "the broadcast of the 'S-Word,' under the circumstances presented here, [was] vulgar, graphic and explicit." *Id.*, ¶139. Moreover, because the offensive content was aired outside the "safe harbor," i.e., between 6:00 a.m. and 10:00 p.m., "there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable." *Id.*, ¶ 142.

Later that same year, however, the Commission reversed its ruling on "The Early Show." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* FCC Docket No. 06-166 (Nov. 6, 2006). Noting that, although "there is no outright news exemption from our indecency rules...in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming." *Id.* at 29, ¶71 (footnote omitted). Recognizing that it had not given "appropriate weight to the nature of the programming at issue (i.e., news programming)" in its earlier order, the Commission denied the complaint. *Id.* at 30, ¶¶ 72 & 73.

In the complaints against ABC affiliates for airing the award-winning film "Saving Private Ryan," some viewers were upset with language of the soldiers' dialogue, which included "'fuck' and its variations; 'hell'; 'ass' and 'asshole'; 'crap'; 'son of a bitch'; 'bastard'; 'shit' and its variations, including 'bullshit' and 'shitty'; 'prick'; and 'pee.'" *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512, ¶ 13 (2005). Despite the fact that such language could easily trigger the indecency rules in other contexts, the FCC found that "[t]he expletives uttered by these men as these events unfolded realistically reflect the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves." *Id.*, ¶ 14.

In commenting on the artistic integrity of the film, the Commission observed: "Deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Id.* at 4513, ¶ 14.

Thus, while the Commission might not agree that there is an officially recognized exemption from indecency rules for news and public affairs broadcasts or artistic works of expression, it has, in practice, long shielded such broadcasts from indecency findings. That practice is consistent with the Constitution and, to that end, the Commission has recognized that "the First Amendment is a critical constitutional limitation that demands, in such determinations, we proceed cautiously and with appropriate restraint." *Id.* at 4510, ¶ 6.

What strains the Constitution, as well as logic, however, is the fact that the *de facto* exemptions provided to news and artistic expression – setting aside the definitional problems associated with the categories – fly squarely in the face of what the FCC has long touted as the underlying rationale for broadcast indecency policy, namely, the protection of children. Those news programs, public affairs interviews and works of artistic expression often air during a time when there is a "reasonable risk" that children will be in the audience. Consequently, the hypothetical first grader that worried Justice Stevens in *Pacifica* could just as easily have his vocabulary enlarged by hearing indecent language during a local newscast as he could by listening to George Carlin's monologue. *Pacifica*, 438 U.S. at 749.

The foundation upon which the Commission has stood for more than four decades – the deep concern that children are harmed by repeatedly hearing indecent language – crumbles when the FCC is willing to permit such language in certain programs despite the fact that children may be in the audience or, at the very least, channel surfing by when the offending remarks are made. Last term, Justice Scalia, writing for the majority in *Brown v. Entertainment Merchants Association*, made a similar observation with respect to California's statute restricting minors' access to violent video games. 131 S. Ct. 2729 (2011).

In that case, the state of California maintained that violent video games were psychologically and physiologically harmful to the minors who played them. Nonetheless, the statute that lawmakers crafted included an exception – one that rendered it "seriously underinclusive," according to the majority, which wrote: "The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK." *Id.* at 2740. In the area of indecency regulation, the FCC has, for decades, adhered to the position that a child's exposure to indecent language in broadcasts is harmful to him or her. Yet, the Commission is "perfectly willing" to expose the child to that harmful language, as long as it is aired in the context of a newscast or a particularly artful television program. As the *Brown* majority concluded with respect to this analogous provision in the California statute, "That is not how one addresses a serious social problem." *Id.*

The Commission cannot have it both ways. If exposure to indecent language truly is harmful in the

broadcast context – an argument addressed and refuted in the next part of this Brief – then it is no less harmful when heard in the context of a newscast, news interview or artistically created program. Because restrictions on those latter categories would fail to survive the hurdles imposed by the First Amendment, the broadcast indecency rules are constitutionally flawed.

II. The Government Lacks Proof of Any Harm to Minors Caused by Hearing Fleeting Expletives on the Broadcast Medium, and Its Indecency Enforcement Regime Provides an Underinclusive Remedy for Curing Any Harm, Even If It Did Exist

The standard of judicial review in this case is controlled by the Court's 2011 ruling in *Brown v. Entertainment Merchants Association, supra*. *Brown*, as in the matter now before the Court, involved a content-based regulation of expression that was ostensibly designed to shield minors from speech that allegedly would somehow harm them.

In applying the strict scrutiny standard of judicial review, the Court in *Brown* wrote that the government must initially "identify an 'actual problem' in need of solving" and then demonstrate that "the curtailment of free speech must be actually necessary to the solution." *Brown*, *supra* at 2738. This represents what one commentator has called a two-step evidentiary and causation process, in which the government must first prove the existence of a harm caused by speech and then prove that the harm will be substantially ameliorated or eliminated by the government's statutory remedy. See Clay Calvert, *The Two-Step*

Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship, 60 Fed. Comm. L.J. 157 (2008). The Court in *Brown* aptly dubbed this a "demanding standard." *Brown*, *supra* at 2738. More importantly, it opined that "ambiguous proof will not suffice." *Id.* at 2739.

In *Brown*, the state of California offered numerous studies purporting to show harm to minors caused by playing violent video games, yet the Court determined that California's "evidence is not compelling." *Id.* Emphasizing the critical difference in social science between the concepts of correlation and causation, the Court wrote that California's studies "do not prove that violent video games *cause* minors to *act* aggressively." *Id.* (emphasis in original). Justice Scalia wrote for the Court that "[t]hey show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game." *Id.*

In the instant case, the government cannot prove causation of any harm to minors from hearing fleeting expletives. That may be because, as one professor of psychology who has studied the issue writes, "there is little good research evidence of harm." Timothy Jay, *Do Offensive Words Harm People?*, 15 Psychol. Pub. Pol'y & L. 81, 96 (2009). The same professor who made that observation also points out that in this Court's seminal indecency ruling in *FCC v. Pacifica Foundation*, its decision was "based on the Justices' folk knowledge of offensiveness but not on any

scientific evidence of harm from indecent speech. The offensiveness of indecent speech was sufficient to restrict indecent speech in *Pacifica*, but offensiveness is not a sufficient basis in cases involving sexual harassment or hate speech. There is no psychological evidence of harm from fleeting expletives." *Id.* at 92. In fact, there may be multiple benefits from using swear words. See Clay Calvert & Matthew D. Bunker, *Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in Fox Television Stations?*, 47 San Diego L. Rev. 737, 753 (2010) (addressing the benefits of swearing).

Even if children learn an expletive from hearing it on television, there is no proof that they are harmed by learning it or that they will, in fact, use it in their own vocabulary. See Calvert & Bunker, *supra* at 751 ("although children conceivably might learn a new expletive from watching and listening to a television program, especially given 'the well-documented ability of preschoolers to learn vocabulary incidentally,' this does not necessarily mean that they will start using that word or saying it as a regular part of their vocabulary" because "social cognitive theory suggests that 'outcome expectancies' will influence whether a behavior is enacted"). As two legal commentators recently wrote:

> [I]f the only alleged harm is the mere use of expletives by minors, is it not the prerogative of parents – not the government – to either praise or punish their children's use of language? Indeed, some parents may not object to their children using expletives, just as they also might not object to allowing their minors to hear an occasional expletive on a television

> program rather than shielding them in an expletive-free, televised bubble that does not reflect the growing use of profanity in the real world.

Calvert & Bunker, *supra* at 752.

In 2009, Justice Antonin Scalia asserted that "[p]rogramming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009). This overlooks the critical difference between learning a word and using that word. Psychology Professor Timothy Jay points out in a recent article on swearing that "[w]e first internalize taboos at a personal level. Indeed, *we learn not to use them when we are punished by caregivers.*" Timothy Jay, *The Utility and Ubiquity of Taboo Words*, 4 Persp. on Psychol. Sci. 153, 153 (2009) (emphasis added).

Parents have the responsibility, not the government, to tell their children what language is and is not appropriate to use. A child will be deterred from using a word if his or her parents make it clear that the use of that word is wrong and that the child will be punished for using it.

Learning a new word does not cause emotional, psychological or physical harm to a child. It may be, then, that the only real harm caused by fleeting expletives is the potentially awkward moment a parent faces when explaining to a child what a particular curse word means and then, presumably, instructing the minor not to use that word (if, of course, the parent believes its usage is inappropriate).

The possibility that this may make parental authority over a minor's vocabulary slightly more difficult is an insufficient reason for censorship, as "the government cannot silence protected speech by wrapping itself in the cloak of parental authority." *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003).

Assuming *arguendo* that the government can demonstrate causation of harm caused by exposure to fleeting expletives in the broadcast medium, the FCC's current indecency-enforcement regime provides an underinclusive and ineffective way of addressing any such harm. The Court wrote in *Brown* that "California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown*, *supra* at 723 – 724.

The FCC's current indecency-enforcement regime represents a seriously underinclusive means of alleviating any harm to minors caused by expletives. Regardless of the words a child hears on broadcast television or radio, a child will still be exposed to profanity on the playground, at school, in the movies, in video games and in songs downloaded from the Internet. As one psychology professor recently observed, "profanity is a ubiquitous feature in human life." Richard Beck, *Profanity: The Gnostic Affront of the Seven Words You Can Never Say on Television*, 37 J. of Psychol. & Theology 294, 294 (2009). See James D. Ivory et al., *Good Clean Fun? A Content Analysis of Profanity in Video Games and Its Prevalence across*

Game Systems and Ratings, 12 CyberPsychology & Behav. 457, 459 (2009) ("all types of profanity" were found to be "relatively abundant" in video games rated M for Mature).

CONCLUSION

Amici respectfully urge this Court to affirm the Court of Appeals' judgment in favor of Respondents FOX Television Stations, Inc., et al.

Robert D. Richards
Counsel of Record for *Amici Curiae*
The Pennsylvania Center
For the First Amendment
308 James Building
University Park, PA 16802
Tel: (814) 863-1900
Email: rdr2@psu.edu

Clay Calvert
Marion B. Brechner
First Amendment Project
2060 Weimer Hall
Gainesville, FL 32611
Tel: (352) 273-1096
Email: ccalvert@jou.ufl.edu

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

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IN THE

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Petitioners,

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PUBLIC BROADCASTING SERVICE AS AMICUS CURIAE SUPPORTING RESPONDENTS

KATHERINE LAUDERDALE
General Counsel
CRAIG A. SPERLING
DANIEL AMIN
PUBLIC BROADCASTING SERVICE
2100 Crystal Drive
Arlington, VA 22202

RYAN M. CHRISTIAN
Counsel of Record
DANIEL B. LEVIN
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, DC 20005
(202) 626-3612
ryan.christian@whitecase.com

Counsel to Amicus Curiae

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT	2
A. Public Broadcasting	2
B. The FCC's Historic Approach To Indecency	7
C. The FCC's New Indecency Policy	11
D. The Effects Of The FCC's New Policy	14
SUMMARY OF ARGUMENT	20
ARGUMENT	22
I. The FCC's New Indecency Policy Is Unconstitutionally Vague	22
A. The FCC's New Indecency Policy Fails To Provide Clear Standards And Therefore Allows For Discriminatory Enforcement	23
B. The FCC's New Indecency Policy Fails To Provide Fair Notice To Broadcasters Of What Material It Will Consider Indecent	26
II. The FCC Should Return To A Standard More Deferential To Broadcasters' Editorial Judgment	31
CONCLUSION	36

TABLE OF CONTENTS—Continued

Page

APPENDIX

APPENDIX A: Public Broadcasters, Related Trade Associations, And Other Entities In Support Of Respondents 1a

TABLE OF AUTHORITIES

CASES Page

Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) 1-2, 9, 22

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 31

Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y.C., N.Y., 56 F.C.C. 2d 94 (1975) 8

Cohen v. California, 403 U.S. 15 (1971) 33

FCC v. Pacifica Found., 438 U.S. 726 (1978) ..... *passim*

Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) 23, 25

Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010) 20, 25, 26

Grayned v. City of Rockford, 408 U.S. 104 (1972) 22, 23, 26, 31

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TABLE OF AUTHORITIES—Continued

Page

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In re Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace," 21 FCC Rcd 2732 (2006) 26

In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd 2760 (2006) 13

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TABLE OF AUTHORITIES—Continued

Page

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In re Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, Fla., 19 FCC Rcd 5022 (2004) 33

In re Various Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664 (2006) 12-13, 14, 28, 29

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Mr. Peter Branton, 1007 Scenic Highway, Tenn., 6 FCC Rcd 610 (1991) 10

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CONSTITUTION

U.S. Const. amend. I 22, 23, 25, 26, 31, 35

TABLE OF AUTHORITIES—Continued

Page

STATUTES

47 U.S.C. § 396(a)(1) 2

47 U.S.C. § 396(a)(3) 3

47 U.S.C. § 396(a)(6) 3

47 U.S.C. § 396(a)(8) 2

47 U.S.C. § 396(k)(8)(A) 5

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TABLE OF AUTHORITIES—Continued

Page

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The Blues: Godfathers and Sons (PBS television broadcast Mar. 11, 2004).....*passim*

PBS, Awards http://pbs.org/about/awards (last visited Nov. 7, 2011)..... 4

PBS, IRS Form 990 (June 30, 2010) 6

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INTEREST OF AMICUS CURIAE

Amicus curiae, the Public Broadcasting Service ("PBS"), and a host of public television producers, broadcasters, and national associations are leaders of the public broadcasting community ("amici").[1] For more than 40 years, amici have produced, distributed, and broadcast award-winning programming that addresses issues of public concern, including social, political, and historical events that play a pivotal role in shaping American culture and society.

Public broadcasters, like Respondents, are subject to regulation by the Federal Communications Commission's ("FCC" or "Commission") new indecency policy, the validity of which is now before the Court. Public broadcasters have been the subject of indecency investigations and at least one Notice of Apparent Liability by the FCC, and collectively they dedicate a substantial amount of their limited resources to efforts to comply with the FCC's indecency policy, while still fulfilling their fundamental obligation to serve the public interest.

The FCC historically has taken a "cautious[]" and "restrained" approach to indecency enforcement. *See FCC v. Pacifica Found.*, 438 U.S. 726, 761 n.4 (1978) (Powell, J., concurring in part and concurring in the judgment) (citing Brief for Petitioner at 42-43 & n. 31); *Action for Children's Television v. FCC*, 852

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[1] Each party has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part in connection with the matter now pending, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. A list of public broadcasters, related trade associations, and other entities who have endorsed this brief in full is included in Appendix A.

F.2d 1332, 1340 n.14 (D.C. Cir. 1988). Recently, however, the Commission has adopted a less restrained, less principled, and less clear approach to regulating broadcast content. The FCC's new indecency enforcement regime is predicated upon an unconstitutionally vague policy that is difficult for any broadcaster to understand, let alone predict how it might possibly apply to its programming. PBS submits this brief to describe the adverse effects of the FCC's new indecency policy on the public broadcasting community.

STATEMENT

A. Public Broadcasting.

The primary mission of public broadcasting is to render a public service by developing and broadcasting programs that instruct, educate, and promote the dissemination of arts and culture. In recognition of these laudable ambitions, Congress declared that "it is in the public interest to encourage the growth and development of public radio and television broadcasting. . . ." 47 U.S.C. § 396(a)(1) (2006). Federal, state, and local governments have endorsed the invaluable service public broadcasting provides by consistently making funding available to public broadcasting for more than forty years.

The American people rely on our nation's public broadcasters to inform, educate, and foster debate by providing programming that "address[es issues of] national concern and solve[s] local problems. . . ." 47 U.S.C. § 396(a)(8) (2006). Congress therefore encourages public broadcasters to develop "programming that involves creative risks" and has recognized that public broadcasters' success "depends on freedom, imagination, and initiative on both local and

national levels. . . ." 47 U.S.C. §§ 396(a)(3), 396(a)(6) (2006).

Public broadcasting fulfills its mandate by delivering content that educates, informs, and inspires. It serves as a trusted window to the world, offering documentaries that open up new worlds, non-commercialized news programs that keep citizens informed about world events and cultures, and programs that expose Americans to music, theater, dance, and art.

As "America's largest classroom," public broadcasting brings creativity and imagination to the forefront in formulating a multitude of programming dedicated to education, especially children's education. PBS, PBS Mission and Values, http://www.pbs.org/about/corporate-information/mission/ (last visited Nov. 7, 2011). Public broadcasting outlets provide thousands of hours of programming to elementary and secondary schools, and produce programs specifically targeting early childhood education. "[C]ommerical outlets tend to excel at entertainment programming, while public broadcasting emphasizes educational content, content geared toward younger children, and content designed specifically to improve cognitive functioning and school performance." Steven Waldman, The Federal Communications Commission, The Information Needs of Communities, 155-56 (July 2011) *available at* http://www.fcc.gov/infoneedsreport ("Community Needs Report"); *see also* Barbara J. Wilson, Children Now, Educationally/Insufficient? An Analysis of Availability & Educational Quality of Children's Programming (2008), *available at* http://pbskids.org/lions/parentsteachers/pdf/childrennow_report.pdf. For many children, public broadcasting teaches them the letters they need for literacy and

the numbers they need to learn math and science. As such, public broadcasters are acutely aware of children's access to and interest in their stations, taking both factors into account in making programming decisions.

Public broadcasting's efforts have met with great success. Some of the most highly-acclaimed programming in the country is broadcast on public television. During the 2010-2011 season, PBS programs received twenty-six Emmy Awards, including six News & Documentary Emmys and twelve Daytime Emmys. PBS topped all broadcast and cable networks for children's programming for the fourteenth consecutive year. *Sesame Street* was honored with eight Emmys, and *The Electric Company* received three awards, including Outstanding Children's Series. During the 2010-2011 award year, PBS and its producers also received nine George Foster Peabody Awards, fourteen Parents Choice Awards, and one Academy Award nomination, among many others. PBS, Awards http://pbs.org/about/awards (last visited Nov. 7, 2011); *see also Community Needs Report*, at 155.

Public television continues to be viewed widely by the American public. In a typical month, more than 124 million people watch their local PBS stations. PBS, PBS: Overview, http://pbs.org/aboutpbs/aboutpbs_corp.html (last visited Nov. 8, 2011). A national Roper survey has consistently rated PBS and its member stations the country's most trusted national institution. TVNewsCheck, Polls: PBS Most Trusted News Source (Feb. 18, 2010), http://www.tvnewscheck.com/article/2010/02/18/39961/polls-pbs-most-trusted-news-source; *Community Needs Report*, at 157.

Public broadcasting earns this trust through its unique role in the communities it serves. Public broadcasters partner with local organizations and directly engage their audience. In addition to nationally-distributed primetime and children's programs, public broadcasters also provide locally-produced and instructional programming to meet the needs of their communities, as well as non-broadcast outreach programs to promote literacy, facilitate teacher training, and provide services for civic engagement and health outreach. U.S. Gov't Accountability Office, GAO 07-150, Telecommunications: Issues Related to Structure and Funding of Public Television 18 (January 2007) ("GAO Report"). Public broadcasting disseminates information regarding local art, music, and other cultural events that is not provided by other sources. And, in a world in which large media corporations are forming ever-larger conglomerates, public broadcasters are often the only locally-owned media providers. *Community Needs Report*, at 158.

These factors, and others, make public broadcasters uniquely responsive to their communities. Federal law requires most public broadcast stations that receive federal funding to establish community advisory boards to provide input on the programming broadcast by their local stations. 47 U.S.C. § 396(k)(8)(A) (2006). Public broadcasters also have a financial incentive to provide programming that serves community needs: Congress recognized in 1992 that "private contributions of $6.1 billion since 1972 constitute the largest source of support for public television." H.R. Rep. No. 102-628 at 69 (1992). Public broadcasters' reliance on private donations means that their success is tied directly to

viewers' satisfaction. *See id.* (magnitude of private contributions indicates "the success of public television in serving the needs and interests of local communities"). This creates weighty disincentives to providing programming that may offend their audience or otherwise betray its trust. That eighty-seven percent of donations are relatively small—less than $1000—bespeaks the personal nature of the relationship between stations and donors and the breadth of support public broadcasting receives. *GAO Report*, at 28.

Notwithstanding the generous support of their local communities, public broadcasters' resources are dwarfed by those of the major commercial television networks. PBS, for example, a national program distributor serving over 350 member stations located across the United States and its territories, earned approximately $500 million in revenue during 2010. PBS, IRS Form 990, 1 (June 30, 2010). As a point of comparison, CBS, which serves a network of about 230 stations across the country, earned over $14 billion in revenue in the same year. CBS, SEC Form 10-K, Fiscal Year 2010, at I-2, II-3, *available at* http://www.sec.gov/Archives/edgar/data/813828/000104746911001419/a2202111z10-k.htm. In light of their relatively limited financial resources, a vague indecency policy weighs especially heavily on public broadcasters and carries with it a substantial risk that they will engage in self-censorship that, in turn, results in the withholding of the unique and valuable content they would otherwise present. Indeed, the threat of large fines has already altered the content amici are willing to broadcast, irrespective of their underlying editorial judgment.

To fulfill its statutory mission, public broadcasting must focus on the pivotal artistic, scientific, historic, and social issues of our time, and it must report on these issues in a way that faithfully reflects their social implications, even when they are controversial or disturbing. The FCC's new, aggressive enforcement policy, lacking in clear and consistent standards, undermines public broadcasters' ability to fulfill their public interest mission. Coupled with the crippling increase in potential indecency forfeitures, the uncertain legal terrain that public broadcasters now must traverse has forced them to engage in self-censorship to avoid potentially catastrophic financial consequences.

B. The FCC's Historic Approach To Indecency.

The federal indecency statute dates to the Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1173 (codified at 18 U.S.C. § 1464), but the FCC did not engage in active indecency enforcement until the 1970s, and, even then, actions were rare. *In re WUHY-FM Eastern Educ. Radio, 4548 Market St., Phila., Pa.*, 24 F.C.C. 2d 408 (1970). The scope of the FCC's authority to regulate indecency was challenged in 1975 when the FCC concluded that a radio station had violated the indecency statute by broadcasting George Carlin's "Filthy Words" monologue. *Pacifica.*, 438 U.S. 726. In concluding that the Carlin monologue was indecent, the FCC determined that "the repetitive, deliberate use of [several words that referred to excretory or sexual activities or organs] in an afternoon broadcast when children are in the audience was patently offensive. . . ." *Id.* at 739.

In its *Pacifica* decision, the Commission indicated that it intended to play a limited role in the

regulation of content and that "the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes." *Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y.C., N.Y.*, 56 F.C.C. 2d 94, ¶ 16 (1975). This Court narrowly upheld the FCC's decision as applied to the broadcast of the Carlin monologue, and two of the five justices who voted to uphold the decision did so on the express assumption that the agency would "proceed cautiously, as it has in the past." *Pacifica*, 438 U.S. at 761 n.4 (Powell, J., concurring in part and concurring in the judgment); *id.* at 760-61 (distinguishing the "isolated use of a potentially offensive word" from "the verbal shock treatment administered by [the] respondent").

In the wake of *Pacifica*, the FCC assured broadcasters that it "intend[ed] strictly to observe the narrowness of the *Pacifica* holding." *In re Application of WGBH Educ. Found. for Renewal of License for Noncommercial Educ. Station WGBH-TV, Bos., Mass.*, 69 F.C.C. 2d 1250, ¶ 10 (1978). Accordingly, it denied a complaint against a public television station that broadcast the word "shit," as well as other "sexually-oriented" content in the *Masterpiece Theatre* series and other programs, finding that the case before it did not resemble the "verbal shock treatment" in *Pacifica* and was therefore "clearly . . . distinguishable." *Id.* The FCC emphasized that it would "construe the *Pacifica* holding consistent[ly] with the paramount importance we attach to . . . editorial discretion by broadcasters," *id.* at ¶ 11, and that it did not intend "to inhibit coverage of diverse and controversial subjects by licensees, whether in news and public affairs or in dramatic or other programming contexts," *id.* Speaking to a group of broadcasters shortly

after *Pacifica*, then-FCC Chairman, Charles Ferris, declared: "We at the FCC are far more dedicated to the First Amendment premise that broadcasters should air controversial programming than we are worried about an occasional four-letter word." Charles Ferris, Chairman, FCC, Address Before the New England Broad. Ass'n, at 8 (Jul. 21, 1978).

Through most of the 1980s, the FCC limited its definition of indecent material almost exclusively to the words emphasized in Carlin's monologue, and consistently refrained from regulating isolated uses of those same words. However, a decade after *Pacifica* was decided, the Commission rejected the proposition that only the "filthy words" expressed by Carlin in his monologue were indecent speech, concluding that the sustained and repetitive use of sexual innuendo and entendre in Howard Stern's morning show was patently offensive. *In the Matter of Infinity Broad. Corp. of Pa.*, Licensee of Station WYSP (FM), Phila., Pa., 2 FCC Rcd 2705, ¶ 8 (1987), ("Infinity Broadcasting I") *aff'd* 3 FCC Rcd 930 (1987) ("Infinity Broadcasting II"). With the introduction of context to analyze patent offensiveness, *Infinity Broadcasting* made the distinction between decent and indecent less clear because broadcasters could no longer be assured that they could avoid liability by omitting specific language. Although context was admittedly fact specific and difficult to define in the abstract, *Infinity Broadcasting II*, 3 FCC Rcd 930, at ¶ 16, the FCC's broadened definition survived constitutional challenge only because of the FCC's steadfast deference to broadcaster judgment. *See, e.g., Action for Children's Television*, 852 F.2d at 1340 n.14 (endorsing the FCC's definition of indecency in part because of its assurances that the

Commission will continue its "restrained enforcement policy.").

The Commission continued to take a more restrained approach over the succeeding decade, especially in its consideration of news programming. In 1991, for example, the agency denied a complaint involving an NPR broadcast of a wiretapped telephone call in which gangster John Gotti uttered ten variations of the word "fuck" in rapid succession during NPR's *All Things Considered* news program. *Mr. Peter Branton, 1007 Scenic Highway, Tenn.*, 6 FCC Rcd 610 (1991) ("Peter Branton"). Observing that "the program segment, when considered in context, was an integral part of a bona fide news story," *id.* at 612, the Commission concluded that the language was not "patently offensive," and therefore not indecent. The FCC further observed that it "traditionally ha[s] been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming." *Id.*

In 2001, the FCC issued a policy statement that described the standard it currently uses in indecency cases and provided examples in which the agency had previously applied this standard. *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd 7999, ¶ 1 (2001) ("Policy Statement"). According to the *Policy Statement*, material is indecent if it (1) "describe[s] or depict[s] sexual or excretory organs or activities," and (2) is "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at ¶¶ 7-8. Applying a national community standard, the FCC determines patent

offensiveness by considering three newly-identified contextual factors: whether the material (1) is explicit or graphic in its description of sexual or excretory organs or activities; (2) dwells on or repeats at length the description; and (3) appears to pander, is used to titillate, or is presented for shock value. *Id.* at ¶ 10.

With respect to the second factor, the FCC drew a distinction between "fleeting and isolated" uses of coarse language, which generally would not be found indecent, and a "persistent focus on sexual or excretory material," which "exacerbate[s] the potential offensiveness of broadcasts." *Id.* at ¶¶ 17-18. Consistent with this approach, the FCC's Enforcement Bureau held in 2003 that U2 lead singer Bono's fleeting statement that his winning of a Golden Globe Award was "really fucking brilliant" was not indecent because it did not satisfy the first prong of the indecency standard—that is, it "did not describe sexual or excretory organs or activities"—but instead was used to "emphasize an exclamation." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd 19859, ¶ 5 (2003) ("Golden Globe I"). The Bureau noted further that it had "previously found that fleeting and isolated remarks of this nature do not warrant Commission action." *Id.* at ¶ 19.

C. The FCC's New Indecency Policy.

In 2004, the FCC departed from its longstanding policy by reversing the Bureau's decision, finding that the word "fuck" and its variations "inherently ha[ve] a sexual connotation" and thus, regardless of context, "depict or describe sexual activities." *In re Complaints Against Various Broadcast Licensees*

Regarding Their Broadcast of the "Golden Globe Awards" Program, 19 FCC Rcd 975, ¶ 8 (2004) ("Golden Globe II"). Under the new standard, which breathed new meaning and significance into the three "principal" contextual factors, any use of the word "fuck" appears to satisfy not only the first prong of the indecency test, but also the first patent offensiveness factor because, according to the FCC, "[the 'F-Word'] invariably invokes a coarse sexual image." *Id.* at ¶19. In addition, because even "isolated or fleeting" uses of coarse language may be indecent, a broadcaster could be liable even if the broadcast does not "dwell on or repeat" the (ostensible) depiction of sexual or excretory activity. In some ways, the emphasis on specific word choice was a return to the standard put forward after *Pacifica*, because it was primarily the word itself to which the FCC took offense. However, after the Golden Globe reversal, the context which had been paramount in *Pacifica* no longer seems to be the guiding consideration in finding liability.

Following *Golden Globe II*, the third patent offensiveness factor—whether the material is presented to pander or titillate or for shock value—became the key to determining liability for broadcasts of expletives and other sexually-themed material. In applying that factor, the FCC has made clear that, outside the context of "news programming," *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299, ¶¶ 69-73 (2006) ("Remand Order"), the burden is now on the broadcaster to convince the FCC that the use of an expletive is "necessary" to convey the program's message, *see In re Various Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21

FCC Rcd 2664, ¶ 77 (2006) ("Omnibus Order"). This third factor was the deciding factor in the FCC's finding that the exposure of Janet Jackson's breast at the 2004 Super Bowl Halftime Show for 19/32 of a second was indecent. *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760, ¶ 13 (2006) ("Super Bowl Order").

The expansion in the scope of the FCC's indecency definition was evident in the FCC's 2006 *Omnibus Order*. The FCC found that a public television station's 2004 broadcast of a Martin Scorsese documentary, *The Blues: Godfathers and Sons* (PBS television broadcast Mar. 11, 2004), which concerned the growth of blues music in Chicago, was indecent because industry leaders used coarse language on eight occasions during interviews. Among others, the documentary profiled Marshall Chess. Chess's father, Leonard, was a Polish immigrant who learned to speak English on the streets of Chicago as a teenager and was later inducted into the Rock and Roll Hall of Fame for co-founding Chess Records, the company that catalyzed Chicago blues.

The FCC based its finding that the documentary was indecent on variations of the word "fuck" that were spoken by Marshall Chess and the word "shit" spoken by several hip hop artists. Chess used expletives in recounting his father's relationship with blues artists. Among other quotes, Chess stated, "[M]y dad had so many people at his funeral, my uncle said, 'You see all those motherfuckers? They're coming to make sure he's dead, so they don't have to pay back those motherfuckin' notes.'" *Omnibus Order*, 21 FCC Rcd 2760, at ¶ 77 (quoting *The Blues*). In another scene, the documentary showed hip hop

artists in a record store with Chess. During the scene, one artist states, "'I'll buy some shit,' and another states, 'This looks crazy! See that? This is the kind of shit I buy! I mean, my man is wearing pink gear—that shit, that shit is crazy right there! I'm buyin' it!'" *Id.* (quoting *The Blues*).

Although Commissioner Jonathan Adelstein found that the language was important to "convey the reality of the subject of the documentary," *id.* at 2728 (Statement of Comm'r Adelstein, concurring in part and dissenting in part), the FCC concluded that the language violated its indecency policy. The FCC first found that the word "shit," like the word "fuck," automatically satisfies the first prong of its indecency test and the first patent offensiveness factor because it "invariably invokes a coarse excretory image." *Id.* at ¶ 75. Applying the second patent offensiveness factor, the FCC found that the expletives were "numerous" and "repeated." *Id.* at ¶¶ 75-76.

As for the third factor, the FCC concluded that the language was "shocking" because "we disagree that the use of such language was necessary to express any particular viewpoint" and because "many of the expletives in the broadcast are not used by blues performers," but instead by hip hop performers and a leading record producer. *Id.* at ¶ 77. The *Omnibus Order* thus places an onerous burden on broadcasters to justify their editorial decisions, in particular with regards to the third factor of whether the material is presented to titillate, pander to, or shock the audience.

D. The Effects Of The FCC's New Policy.

The FCC's policy shift, combined with a ten-fold increase in the maximum monetary forfeiture for

uttering a single expletive from $32,500 to $325,000 per violation, *see* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) (codified as amended at 47 U.S.C.A. § 503(b)(2)(C)(ii) (West 2011)), has dramatically increased the risks borne by public broadcasters. Because each station is treated as a separate violator, the FCC may impose a penalty on every PBS member station that broadcasts indecent or profane material as a separate violation. *See* 47 U.S.C.A. § 503(b)(2)(C)(i) (West 2011). Thus, under the new increased maximum forfeiture, a single expletive broadcast in a program carried by all 353 PBS member stations could result in a forfeiture of nearly $115 million. This amount is over a quarter of the Fiscal Year 2012 federal appropriation for the Corporation for Public Broadcasting's general fund, which provides the federal support for public broadcasters. Corp. for Public Broad., Appropriation Request & Justification: FY2012 and FY2014, 2 (Feb. 2011), *available at* http://www.cpb.org/appropriation/justification_12-14.pdf.

Particularly because of its commitment to educational and children's programming, PBS has always maintained high editorial standards to ensure that the material it distributes to its member stations is appropriate for its audiences likely to be watching at various times of the day. Member stations are then the final decision makers with respect to what they broadcast to their local communities. In spite of its mission to provide high-quality educational and informative broadcasts, the specter of crippling forfeitures has caused PBS to alter long-standing programming practices.

Before the FCC's decision in *The Blues*, PBS delegated decisions about program content to

experienced production and editorial personnel who follow established editorial standards for program accuracy, integrity and diversity. In response to *The Blues* decision, public television content decisions now require added layers of review by legal counsel for producers, stations, and distributors. Allocating funds that could otherwise be used to produce and disseminate broadcasts in accordance with their public service mission to expensive legal analysis places a significant burden on amici's limited budgets. More importantly, it elevates counsel's efforts to apply a vague policy—scrutinizing decisions to make an educated guess as to what the FCC may deem indecent thereunder—above reasoned editorial judgment, resulting in a chilling effect on speech. Thus, programming decisions now may turn not on whether PBS and its member stations believe material to be editorially appropriate for their audiences, but whether particular words, phrases, or situations have been previously adjudicated by the FCC. With the threat of massive fines and editorial judgment hamstrung, public broadcasters cannot risk incorrectly applying the FCC's vague contextual factors. Instead, public broadcasters search for contextual safe harbors that might be inferred from FCC decisions. When none can be found, or the inference is questionable, programs are edited.

The FCC's broadened enforcement activities and its refusal to defer to broadcasters' editorial judgment has forced public broadcasters to edit their programming aggressively, in a way that frequently prevents a full and fair exploration of the topics they portray. Examples of this chilling effect and the

burdens imposed by the enforcement of the FCC's vague indecency policy include:[2]

- American Experience: Eyes on the Prize. This award-winning documentary series about the Civil Rights era included footage of civil rights activist James Forman addressing a rally and concluding a heated speech by stating, "If we can't sit at the table, let's knock the fucking legs off, excuse me." The series was first broadcast in 1987 with no FCC action and without any known complaints about the language. When the series was rereleased in 2006, approximately two dozen stations chose to edit Forman's language.

- American Experience: George H.W. Bush (Bush 41). This documentary about President George H.W. Bush featured a conversation between President Lyndon Johnson and Bush (repeated by the narrator) in which Johnson advises Bush, then a member of the House, that he should run for the Senate because "the difference between being a member of the Senate and a member of the House is the difference between chicken salad and chicken shit." Some stations chose to edit the program because of liability concerns.

- Enron: The Smartest Guys in the Room. This 2007 documentary, which profiled the rise and fall of Enron, included a segment featuring phone recordings of Enron energy

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[2] Copies of the programs described herein are available in the archives of amici and will be made available to the Court upon request.

traders using expletives, including "fuck" and "shit." In the wake of the FCC's Notice of Apparent Liability for broadcasting of *The Blues*, the film was ultimately distributed with the expletives edited out of the program despite the FCC's *Peter Branton* decision.

- Extreme Oil. This series, produced by New York station WNET, addressed the United States' challenge in maintaining a stable supply of oil. The "Pipeline" episode included video shot in Baku, Azerbaijan, including an image of graffiti that read "Fuck America." Even though foreign sentiment—intense hostility to the United States—was an important element of the program's message, WNET ultimately cut the image because of uncertainty about the FCC's policy.

- Frontline: The Soldier's Heart. This documentary on U.S. soldiers' difficulties in seeking treatment for post traumatic stress disorder while serving in Iraq included a veterans' advocate stating that a soldier suffering from the disorder was called a "fucking pussy" by his superiors in order to teach other solders that cowardice would not be tolerated. The producer, WGBH, excised the word "fucking" from the program, but Denver station KRMA-TV nevertheless received an FCC Letter of Inquiry because the broadcast included the word "pussy."

- Marie Antoinette. This documentary on the French Queen included centuries-old political cartoons from the French Revolution depicting the queen engaged in sexual activity, and the reading of a letter written by King Louis'

brother, who described the King's sexual dysfunction. Amici expended considerable resources to determine the legal status of the cartoons and the language describing the King's sexual activities in light of the new FCC policy. Although amici were reluctant to edit because of a desire to ensure that persons and events of historical significance were portrayed in an accurate light, some of the cartoons were edited to avoid liability. Despite the editing, some stations declined to air the program.

- Antiques Roadshow. The unpredictability of the FCC's new indecency policy forced public broadcasters to consider whether to edit an episode to omit footage of a fifty-year-old nude lithograph of Marilyn Monroe, even though the episode had previously been broadcast without known complaints.

- Hip Hop: Beyond Beats and Rhymes. This documentary explores misogyny and sexism in modern hip hop music and how lyrics and images in music videos encourage objectification and subjugation of women. In light of the FCC's new indecency policy, many of the hip hop videos and the very lyrics at issue in the documentary were ultimately edited.

- Operation Homecoming. This documentary explores the experiences of U.S. soldiers serving in Iraq and Afghanistan through their poetry, letters, journals, and essays. The soldiers' writing, read as narration, included seven uses of coarse language. Video included images of Saddam Hussein monuments

defaced with sexually-themed graffiti and a soldier giving the middle finger to a mural of Saddam. PBS ultimately distributed the documentary to many stations with the language and images edited out to avoid costs associated with defending the program in the event of an FCC inquiry.

- The War. This Ken Burns documentary on World War II included a personal account of combat experience by a veteran who used two expletives ("asshole" and "shit"). It also included an episode entitled "FUBAR" that described the terms "FUBAR" ("fucked up beyond all recognition") and "SNAFU" ("situation normal, all fucked up"). Because of concern about the new FCC policy, many stations chose to air an edited version of the program.

These are but some of the many examples of honest, valuable content that viewers have lost because of the FCC's vague new indecency policy.

SUMMARY OF ARGUMENT

The Second Circuit correctly held that "[b]y prohibiting all 'patently offensive' references to sex, sexual organs, and excretion without giving adequate guidance as to what 'patently offensive' means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive." *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2d Cir. 2010). In other words, the FCC's new indecency policy provides no discernible standard by which broadcasters may accurately predict what content is prohibited.

Without deference to the editorial judgment of broadcasters, the FCC's new policy is unconstitutionally vague. The prohibition on "patently offensive" sexual or excretory organs or activities is so vague that a broadcaster cannot determine what speech is prohibited or what considerations will inform the FCC's decision in future cases. Before the FCC's new focus on context, the only saving characteristic of the policy was the FCC's recognition that caution was needed when indecency complaints implicated broadcasters' editorial judgment. Without deference to editorial judgment, the vagueness of the policy allows the FCC to enforce indecency regulation on an entirely subjective basis.

The FCC's aggressive new indecency policy imposes substantial costs on public broadcasters, whose limited financial resource cannot abide the threat of enterprise-threatening fines. To avoid calamitous fines that would compromise their ability to continue producing high-quality educational and cultural programming, amici must devote substantial time and resources to screening material—including programs previously broadcast without complaints or enforcement actions—and to make decisions that may compromise their obligations to offer programs that honestly characterize their subjects. Amici urge the Court to reject the FCC's new indecency policy because of the chilling effect it imposes on constitutionally-protected speech.

The FCC should adopt an enforcement policy that is clear and easy to apply in advance, that gives suitable deference to editorial judgment, and in particular, the intent to provide educational, informational, and cultural programs through documentaries, and other similar programs that address

matters of public interest, and that explicitly recognizes the greater chilling effect fines have on not-for-profit broadcasters.

ARGUMENT

This Court has relied on the FCC's exercise of restraint in rejecting prior challenges to its indecency policy. The FCC has now abandoned restraint by imposing heavy burdens of justification on broadcasters without meaningful deference to their editorial judgment. The FCC's vague new indecency policy operates on a post-hoc, retrospective basis, leaving broadcasters to guess what the FCC will find indecent in each case. The uncertain legal terrain on which broadcasters now teeter, creates a chilling effect on constitutionally-protected speech that the First Amendment cannot tolerate.

I. The FCC's New Indecency Policy Is Unconstitutionally Vague.

The FCC's new indecency policy is unconstitutionally vague,[3] because it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, [and] is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The dramatic shift in FCC enforcement efforts and the evolution of its contextual framework

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[3] In *Action for Children's Television*, then-Judge Ginsburg observed that *Pacifica* "did not address, specifically, whether the FCC's [indecency] definition was on its face unconstitutionally vague, 852 F.2d at 1338, and went on to conclude that "vagueness is inherent in [the FCC's definition]." *Id.* at 1344.

for determining patent offensiveness expose a failure to establish consistent, adequate standards for reviewing "context," and mark a precipitous departure from the restrained enforcement approach required by *Pacifica*. The result is a policy that provides too much flexibility for the FCC subjectively to reach any desired outcome when applied *post hoc*, and not enough clarity to allow broadcasters acting prospectively to avoid violations without engaging in self-censorship. This prospective avoidance is acutely taxing on amici because it significantly drains the already limited funds available to them to make and distribute quality programming.

A. The FCC's New Indecency Policy Fails To Provide Clear Standards And Therefore Allows For Discriminatory Enforcement.

The FCC's new indecency policy is an effectively standardless framework that permits discriminatory agency enforcement borne from subjective reasoning. *See Williams*, 553 U.S. at 306 (observing that the Court has invalidated statutes that require an indecency finding because such a standard turns on "wholly subjective judgments"). The danger that inheres therein is plain: "A vague law [that] impermissibly delegates basic policy matters to [government officials] on an *ad hoc* and subjective basis," *Grayned* 408 U.S. at 108-09, "has the potential for becoming a means of suppressing a particular point of view," *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)). The FCC's recent enforcement history lends credence to this most fundamental of First Amendment fears.

The FCC's new indecency policy purports to find consistency in the application of three principal factors to guide determinations of whether material is patently offensive: (1) "the explicitness or graphic nature of the description or depiction"; (2) "whether the material dwells on or repeats at length" the description or depiction; and (3) "whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value." *Policy Statement*, 16 FCC Rcd 7999, at ¶ 10. But the application of these factors has lead to unpredictable results.

In applying its newly-anointed principal factors to a host of programs in an effort to provide industry guidance, the FCC has been more successful in promoting industry confusion. Applying these factors to *Saving Private Ryan*, which on its face meets all three factors for patent offensiveness, the FCC concluded that the film was not indecent because other factors such as "merit," and the "essential" nature of the language counteracted the weight of the shocking, pandering, or titillating factor. *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, ¶¶ 11, 14 (2005) ("Saving Private Ryan"). The FCC reached the opposite conclusion in applying these factors to *The Blues*, concluding that the use of coarse language indistinguishable from that used in *Saving Private Ryan* rendered the Martin Scorsese documentary about the growth of blues music in Chicago indecent. Unexplainable by reference to the three patent offensiveness factors, broadcasters are left to formulate their own explanation of the differing outcomes in *Saving Private Ryan* and *The Blues*.

One such explanation may be a results-oriented approach to indecency review whereby the subjective biases of regulators concerning the value of specific content or the merit of a particular viewpoint are the guide. The mere appearance of that troubling result raises grave First Amendment concerns. *See Fox*, 613 F.3d at 333; *Forsyth County, Ga.*, 505 U.S. at 130.

The FCC may defend the appearance of seemingly contradictory results as unavoidable in the contextual indecency regime *Pacifica* upheld. *Pacifica*, 438 U.S. at 742 (observing that "indecency is largely a function of context—it cannot be adequately judged in the abstract"). Yet, *Pacifica's* observation was tempered by the high degree of regulatory restraint exhibited by the FCC at that time, *id.* at 760-61 (Powell, J., concurring in part and concurring in the judgment), an approach the FCC has long since abandoned, *see Fox* , 613 F.3d at 329. In decreasing its regulatory restraint, the FCC necessarily has increased its regulatory discretion, through an abstract notion of context, to a level *Pacifica* never condoned. In that regard, *Pacifica* would seem to offer the FCC no greater comfort than that which its indecency policy offers broadcasters. None.

That the touchstone of indecency review is context does not lessen the need for clear principles to guide and cabin agency discretion. Because the FCC's new indecency policy provides no clear principles, it is too vague to survive any searching constitutional review.

B. The FCC's New Indecency Policy Fails To Provide Fair Notice To Broadcasters Of What Material It Will Consider Indecent.

The Commission's new indecency policy fails to provide broadcasters with clear guidance that would allow them confidently to "steer" between decent and indecent content as defined by the FCC. *Grayned*, 408 U.S. at 108. Instead, "because the boundaries of the forbidden areas [are not] clearly marked," *id.* at 109, broadcasters, especially public broadcasters, must "steer far wider of the unlawful zone, rather than risk massive fines" that may threaten the continued viability of their organizations, *Fox*, 613 F.3d at 328 (internal citations omitted). Because the FCC's indecency policy does not provide broadcasters with fair notice of what conduct it prohibits, it cannot pass First Amendment muster.

The FCC's varying, inconsistent application of its three factor "patently offensive" test highlights the constitutional deficiency of its indecency policy. In practice, the factors—particularly the shock-pander-titillate factor—are nothing more than vague abstractions of a host of ever-changing, fact-specific determinations that the FCC makes behind the scenes to determine patent offensiveness. In some cases, a warning to viewers of the fact that a program is not intended as "family entertainment" may influence the Commission. *Saving Private Ryan*, 20 FCC Rcd 4507, at ¶¶ 3 & 15. In others, the presence of minors may control. *In re Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace,"* 21 FCC Rcd 2732, ¶ 15 (2006). In still others, an FCC decision may turn on what a hypothetical child

watching the program could discern from the material. *In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America"* on April 7, 2003, 23 FCC Rcd 3222, ¶ 12 (2008). Specific past applications provide little illumination because of these varying considerations and because their scope is nearly impossible to establish. At best, the FCC's *post hoc*, case-by-case, analyses are harbingers of its approach to the exact same specifically-complained-of material in the future.

The Blues exemplifies the fatal lack of notice the FCC provides to broadcasters. Before *The Blues* episode at issue aired on March 11, 2004—seven days before the FCC's new indecency policy came to life in *Golden Globes*, *see* 18 FCC Rcd. 19859 (rel. March 18, 2004)—broadcasters had but a handful of FCC decisions against which to measure the documentary, *Policy Statement*, 16 FCC Rcd. 7999. The vast majority of these addressed "shock-jock" comedy sketches. Few concerned cultural, educational, and informational programs like *The Blues*. Accordingly, broadcasters could only compare *The Blues* to an NPR news story on mob figure John Gotti that contained multiple uses of "fuck", *id.* at ¶ 21, graphic female nudity in *Schindler's List*, *id.*, and three talk-show programs best categorized as sex education programs, *id.* In light of the contextual range established by the 2001 *Policy Statement*, it is no wonder that broadcasters of *The Blues* adjudged the program to be closer in content to educational and informational programs that the FCC previously had concluded were not indecent because any objectionable content in *The Blues* was not presented in a pandering or titillating manner. *Id.*

It was not until nearly one year after *The Blues* aired that the FCC announced what is now its key standard for determining when fleeting (or repeated) expletives render a program indecent. *Saving Private Ryan*, 20 FCC Rcd 4507, at ¶¶ 14, 18. Under that standard, the FCC's considers whether the expletives are "essential" or "integral to the film's objective." *Id.* at ¶ 14. Applying this standard in *Saving Private Ryan*, the FCC concluded that the uses of "fuck," "shit," "hell," "ass," "son of a bitch," "bastard," and their variations, *id.* at ¶ 13, did not render the material patently offensive because "deleting all of such language or inserting milder language . . . would have altered the nature of the artistic work and diminished [its] power [and] *realism*," in conveying the horrors of war, *id.* at ¶ 14 (emphasis added).

Handing down *The Blues* decision more than two years after that program aired and nearly one year after its *Saving Private Ryan* decision, the FCC concluded that the use of "fuck" and "shit" and their variations in *The Blues* rendered it indecent material, despite also finding that the broadcaster might reasonably have believed that the expletives in *The Blues* "served a legitimate informational purpose." *Omnibus Order*, 21 FCC Rcd 2664, at ¶ 85. The FCC did not explain, however, why it concluded that the expletives were not "essential to the nature" of the program, considering that *The Blues* is a documentary intended to tell the *real life* story of persons "with their own words," *id.* at ¶ 73, an especially troubling result in light of the FCC's emphasis on the need to promote "*realism*" in condoning the use of expletives in *Saving Private Ryan*, a *fictional*, albeit realistic, depiction of war, *Saving Private Ryan*, 20 FCC Rcd 4507, at ¶ 14

(emphasis added). The lack of fair notice that broadcasters must endure persists as the FCC identifies new and varied contextual distinctions with each new case. Indeed, *The Blues* suggests additional finely-distilled contextual distinctions are still to come. *See Omnibus Order*, 21 FCC Rcd. 2664, at ¶ 77 (suggesting that the FCC's indecency conclusion may have been otherwise different if the expletives had been spoken by the performers, rather than the industry executives).

Even with their incrementally increased knowledge of new contextual factors, broadcasters cannot ascertain the scope of the FCC's contextual framework. Presumably, the FCC does not intend to limit permissible uses of "fuck," "shit," and graphic nudity *only* to news programs and dramatic war films about World War II. To do so effectively would create categorical exemptions: a result the FCC wishes to avoid. *See Remand Order*, 21 FCC Rcd 13299, at ¶71 (clarifying that the FCC recognizes "no outright news exemption"). But this is the practical effect when the scope of the FCC's contextual framework is established by things that *do not* qualify. Broadcasters relying on FCC guidance to analyze expletives and nudity in upcoming broadcasts cannot possibly have fair notice of the potentially limitless number of contextual factors (or the level of importance assigned to each one) on which the next FCC decision may turn.

Evaluating material that has received little, if any, FCC attention is even more problematic. For example, amici face a real dilemma with anthropological documentaries about indigenous foreign cultures, some members of which, in their natural environments, do not cover their sexual

organs with clothing.[4] Notwithstanding the FCC's vague notion of community standards, amici strongly believe that a study of other cultures mandates an accurate portrayal of those cultures in their natural settings. Editing documentary footage of indigenous tribal people for fear of FCC fines unjustly injects alien cultural norms into the material in direct conflict with its educational purpose. But with no known FCC decisions on nudity in the context of an anthropological documentary, and without being able to rely on editorial judgment because it is unclear whether such a program would qualify as "news and public affairs" programming, amici are left to wonder if nudity in this context will be allowed under *Schindler's List*, under some other contextual reasoning, or prohibited all together.[5] For amici,

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[4] Oregon Public Broadcasting ("OPB"), producer of *Art Wolfe's Travel to the Edge*, was compelled to edit the episode, "Ethiopia: The Omo Valley," featuring Ethiopian tribes-people in their native dress after a discussion with their distributor and legal counsel about the risk of bare buttocks appearing on television. OPB eventually edited this footage out of the episode for national audiences despite a firm belief that the material was suitable for its audience in Portland in the context of a nature documentary.

[5] Another example of the FCC's failure to provide fair notice of what constitutes indecent conduct is the absence of guidance on the use of the middle finger gesture, which was at issue in *Operation Homecoming*. *See supra*, at 19. Although amici have been unable to find any FCC case concluding that the gesture is indecent, the *Remand Order* referenced Nicole Richie and Paris Hilton's use of the gesture during an episode of "The Simple Life" to refute Fox's assertion that it could not have predicted Ms. Richie would use expletives during "The Billboard Music Awards." *Remand Order*, 21 FCC Rcd 13299, n.94. Although editorial judgment may dictate the image of a U.S. soldier in Iraq making the gesture to a mural of Saddam Hussein highly relevant within the context of the documentary,

editing a program to be less culturally accurate runs counter to their highly respected statutory mission, but may be a necessary means to avoid fines that would threaten their continued ability to fund their programming.

FCC decisions provide some insight into how the Commission will evaluate American soldiers using expletives in combat situations, nude Holocaust victims in a Nazi concentration camp, or celebrities making off the cuff remarks during live award shows, but the clarifying nature of the FCC's rulings ends with the facts specific to those cases. Operating under the FCC's vague indecency policy, broadcasters struggle to apply FCC "guidance" to new material that does not fall neatly within the contextual analyses of previous FCC decisions. The First Amendment will not permit that result. *See Grayned*, 408 U.S. at 108 ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 238 (2002) ("The First Amendment requires . . . precise restriction[s].").

II. The FCC Should Return To A Standard More Deferential To Broadcasters' Editorial Judgment.

The FCC should adopt an enforcement policy that is not only clear and easy to apply in advance, but one that gives suitable deference to editorial judgment, and in particular, editorial judgment motivated by the intent to educate and inform the public. A standard that distinguishes between this

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the *Saving Private Ryan* order does not clearly protect the gesture.

intent and the intent to shock, pander, or titillate would greatly reduce the chilling effect that fines may have on amici, as not-for-profit broadcasters. By establishing a clear and deferential standard, the Commission would bolster the public mission that amici have undertaken, and that decades of Congressional policy and federal, state, and private funding have recognized and encouraged.[6]

In the years following *Pacifica*, the FCC recognized that a restrained enforcement policy required deference to broadcaster editorial judgment for all forms of programming. This approach allowed broadcasters, such as amici, to provide quality documentary, educational, and journalistic programming that explored important political, social, and historical topics without fear that coarse language or imagery may render it indecent. When the FCC established its contextual framework in the 2001 *Policy Statement*, it made no mention of consideration for broadcaster judgment. Since that time, the FCC has clearly given more weight to an arbitrary application of three abstract contextual factors at the expense of broadcaster editorial decision making. Broadcaster judgment is now only considered as a safety valve—and only in undefined "news and public affairs" contexts—when a plain application of the FCC's contextual framework produces the wrong conclusion. *See Remand Order*, 21 FCC Rcd 13299, at ¶¶ 69-71 (reversing the Commission's own indecency finding against "The Early Show"). The FCC's move to abandon, in most

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[6] The FCC has adopted a deferential standard in the selection and production of news and editorial programming. Similar deference to documentary and educational programming would facilitate amici's obligation to perform a similar public service.

cases, its deference to broadcasters' judgment flies in the face of the restrained approach required by *Pacifica*.

No broadcaster can predict the rationale that will control the FCC's application of its various contextual factors, which requires FCC Commissioners to substitute their inherently subjective judgment for the editorial discretion of the broadcaster. Although the FCC maintains that its subjective judgments are based on its "collective experience and knowledge, developed through constant interaction with" various parties, *In re Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, Fla.*, 19 FCC Rcd 5022, ¶ 12 (2004), the Court has emphasized that "governmental officials cannot make principled distinctions in this area," *Cohen v. California*, 403 U.S. 15, 25 (1971). Without due consideration of the editorial judgment of broadcasters, any FCC policy is unconstitutionally vague under *Pacifica*.

The FCC's indecency policy ignores public broadcasters' public service mission and their ties to local communities. Public television stations are owned and operated by organizations firmly rooted in local communities, including state and local governments, colleges and universities, and other locally-run not-for-profit entities. *See Community Needs Report*, at 153 ("The broad base of public broadcasting funding is an underappreciated attribute of the system . . . . [A] system [that is] rooted in local connections, civil society partnerships . . . and diverse financial support."). For a national program distributor like PBS, its member stations provide a more direct feedback loop concerning community standards than any FCC indecency policy ever could. Indeed, PBS is routinely reminded by its

member stations that what plays in New York does not necessarily play in New Mexico.

Public broadcasters have developed their editorial judgment for adult programs in light of decades of serving local viewing audiences. Public broadcasters also take seriously their role as a safe haven for children amidst a crowd of other television channels. *GAO Report*, at 21-22. Public broadcasters recognize that the nature and quality of their children's programs draw children to their channels during the day and foster public trust. This knowledge compels public broadcasters to make all programming decisions, whether for adult or child content, in light of the impact they may have on the public's trust. *Community Needs Report*, at 152 ("[P]ublic broadcasters have generally achieved a high level of respect among the public . . . [and] [p]ublic television . . . seems to occupy a special place of honor for a wide swath of Americans.").

The FCC's new indecency policy suffers from many fundamental flaws. Amici focus on the FCC's abandonment of deference to editorial judgment as manifested by its decision in *The Blues*, where the FCC imposed a heavy burden of justification on the broadcaster and thereby overrode its editorial judgment. The utterly subjective nature of the rationale the Commission provided for finding liability in *The Blues* is a lesson in the peril that attends permitting the government to punish speech.

Before the new FCC indecency policy, broadcasters were not just permitted to rely on their own judgment to determine whether material may be indecent, they were "obligated" to do so. *Infinity Broadcasting II*, 3 FCC Rcd 930, at ¶ 15. But under the FCC's current approach, in an apparent move

away from *Pacifica*, it is the sole arbiter of "community standards." The FCC thereby imposes its subjective views on each of the communities that its broadcast licensees serve, substituting its judgment for that of broadcasters. This approach chills constitutionally protected speech and is thus anathema under the First Amendment. Amici are closely tied to the local communities they serve. As such, they are far more likely to have an accurate gauge of, and commitment to, community standards, which the FCC has all but acknowledged in broader contexts. *Community Needs Report* at 155 ("It has been left largely up to local public broadcasters to define what [it] means [to serve the public with media content], with each creating its own mix of educational, music, cultural, talk, and public affairs programming."). Applying a standard that would defer to public broadcasters' good faith judgments would be a step toward returning to the cautious, constitutionally-acceptable approach endorsed in *Pacifica*—one in which the FCC would be "far more dedicated to the First Amendment premise that broadcasters should air controversial programming than . . . worried about an occasional four-letter word." Charles Ferris, Chairman, FCC, Address Before the New England Broad. Ass'n, at 8 (Jul. 21, 1978).

Amici are closely attuned to the standards expected and the values supported by their audience. The Commission should return to an indecency policy that defers to amici's judgment in identifying the best means of fulfilling their statutory mission.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

KATHERINE LAUDERDALE
General Counsel
CRAIG A. SPERLING
DANIEL AMIN
PUBLIC BROADCASTING SERVICE
2100 Crystal Drive
Arlington, VA 22202

NOVEMBER 2011

RYAN M. CHRISTIAN
Counsel of Record
DANIEL B. LEVIN
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, DC 20005
(202) 626-3612
ryan.christian@whitecase.com

Counsel to Amicus Curiae

APPENDIX

APPENDIX A

PUBLIC BROADCASTERS, RELATED TRADE ASSOCIATIONS, AND OTHER ENTITIES IN SUPPORT OF RESPONDENTS

Amicus, the **Public Broadcasting Service** is a nonprofit membership organization of the licensees of the nation's public television stations. PBS distributes national public television programming and provides other program-related services to the nation's public television stations.

The following entities and organizations endorse the positions set forth in this brief in full:

The **Association of Public Television Stations** is a nonprofit organization whose members comprise the licensees of nearly all of the nation's Corporation for Public Broadcasting-qualified noncommercial educational television stations.

WGBH Educational Foundation is a major producer of national public television programming, including *American Experience*, *Frontline*, *Masterpiece*, and *NOVA*, and the licensee of three public television and five public radio stations in Massachusetts.

WNET is a pioneering provider of public television programming and the licensee of THIRTEEN (WNET), the flagship public television station serving the New York metropolitan area, and WLIW21 (WLIW), the third most watched public television station in the nation.

San Mateo County Community College District the licensee of public television station KCSM-T , San Mateo, California, and was subject to an FCC indecency finding and proposed forfeiture in

2006 for its broadcast of *The Blues: Godfathers and Sons*.

Iowa Public Broadcasting Board is the licensee of public television stations KIIN, Iowa City; KSIN-TV, Sioux City; KDIN-TV, Des Moines; KRIN, Waterloo; KBIN-TV, Council Bluffs; KTIN, Fort Dodge; KHIN, Red Oak; KYIN, Mason City and KQIN, Davenport, Iowa.

Rocky Mountain Public Broadcasting Network, Inc. is the licensee of public television stations KRMA-TV, Denver; KTSC, Pueblo; KRMU, Durango; KRMJ, Grand Junction and KRMZ, Steamboat Springs, Colorado.

State of Wisconsin — Educational Communications Board is the licensee of public television stations WHLA-TV, La Crosse; WLEF-TV, Park Falls; WPNE, Green Bay; WHWC, Menomonie and WHRM-TV, Wausau, Wisconsin.

WHYY, Inc. is the licensee of public television stations WHYY-TV, Wilmington, and WDPB, Seaford, Delaware.

KCTS Television is the licensee of public television stations KCTS-TV, Seattle and KYVE, Yakima, Washington.

Oregon Public Broadcasting is the licensee of public television stations KOPB-TV, Portland; KOAC-TV, Corvallis; KEPB-TV, Eugene; KTVR-TV, La Grande and KOAB-TV, Bend, Oregon.

Twin Cities Public Television, Inc. is the licensee of public television stations KTCA-TV and KTCI-TV, St. Paul/Minneapolis, Minnesota.

Greater Washington Educational Telecommunications Association is a producer of public television programming and the licensee of public television station WETA-TV, Washington, D.C.

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Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET. AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* JUDITH A. REISMAN, PH.D. AND LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

STEPHEN M. CRAMPTON
MARY E. MCALISTER
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000

MATHEW D. STAVER
Counsel of Record
ANITA L. STAVER
HORATIO G. MIHET
LIBERTY COUNSEL
1055 Maitland Center Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Attorneys for Amici

238097

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

LEGAL ARGUMENT 5

I. THE FCC'S DECENCY STANDARDS ARE REASONABLE AND NECESSARY MEANS OF FULFILLING THE FCC'S OBLIGATION TO PROTECT THE PUBLIC'S INTEREST. 5

II. THE FCC'S DECENCY STANDARDS FURTHER THE COMPELLING STATE INTEREST IN SAFEGUARDING CHILDREN WHILE STILL PRESERVING BROADCASTERS' FREE SPEECH RIGHTS. 11

A. This Court Has Established That Indecent Speech Can Be Regulated In The Broadcast Context To Protect The State's Compelling Interest In Protecting The Well-Being Of Children. 12

1. Recognizing the harm that indecent language inflicts on children, this Court has upheld narrowly

tailored restrictions on such language in the media. 15

2. Courts have established that placing a time restriction on the broadcast of indecent language is a narrowly tailored response to the state's compelling interest in protecting children. 19

B. Research Regarding Brain Development And Observational Learning Underscore The Need To Protect Young People In Particular From Even Fleeting Utterances Of Indecent Language. 21

III. THE DECENCY STANDARDS ACT AS A BULWARK AGAINST THE NORMALIZATION OF PROFANITY AND INDECENCY WHICH DETRIMENTALLY AFFECTS ALL CITIZENS, BUT PARTICULARLY WOMEN AND CHILDREN 31

A. Profanity Is A Form Of Aggression Which Leads Which Is Mimicked By Children 31

B. The Increased Frequency of Indecent Words During Prime Time Broadcasts Points To The Need To

Maintain Or Strengthen, Not Lessen, Decency Standards To Protect The Public's Interest. 36

C. Profanity Is Used As A Tool For Sexual Harassment And Assault So Stemming Its Proliferation Through Decency Standards Serves The State's Compelling Interest In Protecting Its Citizens. 39

D. Maintaining Decency Standards Helps Stop Popular Culture From Sliding Into "The Abyss of Human Decadence." 42

CONCLUSION 46

TABLE OF AUTHORITIES

CASES

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58 F.3d 654 (D.C. Cir. 1995)..... 10

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68 F.3d 525 (1st Cir. 1995)..... 11

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Paul Mardsen, *Memetics and Social Contagion, Two Sides of the Same Coin?* 2 THE JOURNAL OF MEMETICS: EVOLUTIONARY MODELS OF INFORMATION TRANSMISSION 2 (1998), ... 23

Philip Kotler, MARKETING MANAGEMENT, 345 (1988 27

Project on the Decade of the Brain, http://www.loc.gov/loc/brain/ 13

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Richard Restak, THE MIND, 283 (1988) 14

Robin L. Nabi & Marina Krcmer, *Conceptualizing Media Enjoyment as Attitude: Implications for Mass Media Effects Research*, 14 COMMUNICATION THEORY 288 (November 2004) 27

WASH. POST, June 26, 1983, at B3 10

INTEREST OF AMICI CURIAE[1]

Liberty Counsel is an international nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Virginia, Texas, Washington, D.C., and Jerusalem, Israel and has hundreds of affiliate attorneys in all fifty states. A critical aspect of Liberty Counsel's mission is to preserve and protect the Judeo-Christian foundation of the country, and particularly the foundational social unit of the family. Liberty Counsel sees the infiltration of indecent language, sexualization of children and disrespect for human life as significant threats

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this brief. The parties have filed consents to the filing of amicus briefs in support of either party or no party.

to the family and the country which should be stemmed before the foundations are so undermined that they crumble. While Liberty Counsel does not support increasing the power of the federal administrative structure, it does believe that administrative agencies such as the Federal Communications Commission, if properly restrained, can serve vital roles as guardians of the public interest. The broadcast decency standards under consideration in this case are examples of an agency fulfilling its role as guardian and, as such, they should be examined with great care and precision. Liberty Counsel has developed a body of research on how changing cultural standards have detrimentally affected the family and other foundational institutions. Liberty Counsel respectfully submits this Amicus Curiae Brief to provide this Court with information and arguments that may be of assistance in analyzing the constitutional issues raised by this case.

Judith A. Reisman, Ph.D., is an internationally recognized expert in media forensics, who has done groundbreaking research in the effects of media content on children, families and society. Dr. Reisman is also recognized internationally as an expert in the effects of the work of Dr. Alfred Kinsey on social institutions, and particularly, the family.

Dr. Reisman has done extensive research on the long-term effects of early exposure to indecent language and images – research that will provide this Court with further perspective on the FCC decency standards being challenged in this case. Dr. Reisman (drjudithreisman.com) is the author of numerous books and reports, including *Kinsey, Sex and Fraud, "Soft Porn" Plays Hardball, Kinsey Crimes and Consequences, Sexual Sabotage* and *Images of Children, Crime and Violence in Playboy, Penthouse and Hustler,* (United States Department of Justice Grant No. 84-JN-AX-K007). Dr. Reisman also respectfully submits this Amicus Curiae Brief for the Court's consideration.

SUMMARY OF ARGUMENT

The question at the heart of this case is whether broadcasters will be permitted to remove the restraints that prevent popular culture from sliding even further into an abyss of dehumanized decadence. Claiming that the decency standards which have been in place for decades are now too vague to be enforced, the broadcasters are in fact asking this Court to aid them in their subversion of America's cherished cultural heritage of civil discourse and enriching entertainment. Broadcasters claim that their individual First Amendment rights are somehow violated by having to wait until

10 p.m. to spew expletives referring to sexual or excretory functions or organs. These privileged broadcasters seek to trample on the rights of the owners of the airwaves, the people of the United States, to ensure that the people's limited resources are utilized in a way that is beneficial, not harmful to, the public interest. These broadcasters appear indifferent, even contemptuous, of the government's obligation to prevent the sexual abuse and exploitation of vulnerable children that is often triggered by exposure to indecent images and words.

Social science and psychological studies demonstrate that even fleeting utterances of indecent words can adversely affect the developing brains of children and youth, making the need to restrain the use of such language even more critical. Balancing what is at stake – the well-being of children—with the restrictions placed on esurient broadcasters to merely limit indecent language to 10 p.m. to 6 a.m. (as opposed to banning it entirely) leads to the inescapable conclusion that the decency standards should remain in place.

This Court should not condone the further slide of popular culture championed by the networks. Instead, this Court should, as it has before, uphold the FCC's regulations by which it fulfills its role as guardian of the

public airwaves from which broadcasters derive profit and prestige.

LEGAL ARGUMENT

I. THE FCC'S DECENCY STANDARDS ARE REASONABLE AND NECESSARY MEANS OF FULFILLING THE FCC'S OBLIGATION TO PROTECT THE PUBLIC'S INTEREST.

Since Congress first began regulating the airwaves in 1934, regulators and the courts have recognized the need to balance broadcasters' First Amendment rights with their obligations as trustees of the public airwaves. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-88 (1969). Congress has designated the FCC as the "overseer" or "guardian" of the public's interest as owners of the airwaves. *Id.* at 379. In fulfilling that role, the FCC has developed a regulatory scheme, including the indecency standards at issue in these cases, as a means of protecting the paramount rights of the viewers and listeners. *Id.* This Court has upheld the regulations against claims of vagueness, censorship and overbreadth. This Court has recognized that the regulations are reasonable and appropriate means of furthering the state's, and public's, interest in regulating the transmission of indecent words

and images to protect the well-being of children. Nothing has occurred to change that conclusion. If anything, the proliferation of indecent language, and its consequences, accentuates the need to maintain or strengthen, not weaken, decency standards.

In analyzing governmental restrictions on broadcasters, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broad*, 395 U.S. at 390. Since radio and broadcast frequencies are limited, the government is permitted to put restraints on licensees as part of ensuring that the people as a whole retain their interest in free speech in broadcasting and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *Id.* "Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." *Id.* at 394.

Licensees, therefore, have, since the early days of broadcast regulation, served solely as "public trustees" required to operate in the public interest with the FCC acting as "overseer." *CBS, Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 117 (1973). Fulfilling those roles has required balancing the sometimes competing interests of the broadcasters' view of their free speech rights

and the public's right as owner of the airwaves. *Id.* As this Court observed, maintaining that balance for more than 70 years has required that both regulators and licensees "walk a 'tightrope' to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act." *Id.* In *CBS v. D.N.C*, this Court acknowledged that the FCC could take into account that listeners and viewers in a very real sense constitute a "captive audience." *Id.* at 127.

> Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may

> reasonably be thought greater than the impact of the written word.

Id. at 127-28 (citing *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)). The same can be said of even "fleeting" utterances of indecent language. Once spoken, the word is "in the air," and, more importantly, imprinted in the viewer's mind. As this Court explained in *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978), "broadcasting is uniquely accessible to children, even those too young to read." Therefore, while an expletive printed on some clothing or in a publication might not be comprehended by a youngster, a broadcast containing the same word would be instantly recorded in the young child's mind. *See id.* This ease of access and the ubiquity of broadcast programming "amply justify special treatment of indecent broadcasting." *Id.* at 750.

The statutory prohibition against "utter[ing] any obscene, indecent, or profane language" in broadcast programming aired between 10 p.m. and 6 a.m., 18 U.S.C. § 1464, is one of the enforceable public obligations that broadcast licensees rightfully shoulder as part of being "granted the free and exclusive use of a limited and valuable part of the public domain." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009). A broadcast license is a privilege, not a right. *CBS v. DNC*, 412 U.S. at

112-13. With that privilege comes the responsibility of protecting the public's interest as owners of the airwaves. *See F.C.C. v. Fox*, 129 S. Ct. at 1806. That includes refraining from airing indecent words during times when those least able to discern their impropriety are likely in the audience. *Pacifica Found.*, 438 U.S. at 750.

Broadcasters do not have the right to air whatever programming they calculate will garner them the highest profits without regard for their underlying obligation as privileged public trustees. The balancing of their interests with the interests of the viewing public requires that restrictions on transmission of indecent language remain in place.[2] While their

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[2] As the D.C. Circuit observed, millions of children are watching television even during what is euphemistically called the "safe harbor" hours between 10p.m. and 6a.m. "It is apparent, then, that of the approximately 20.2 million teenagers and 36.3 million children under 12 in the United States, a significant percentage watch broadcast television or listen to radio from as early as 6:00 a.m. to as late as 11:30 p.m.; and in the case of teenagers, even later. We conclude that there is a reasonable risk that large numbers of children would be exposed to any indecent material broadcast

profitability might benefit from removal of the time restriction, their obligation as public trustees, and the interests of the owners of the airwaves, will not.[3] Since "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount," *Red Lion*, 365 U.S. at 390, the public's interest takes precedence over any perceived increase in profitability that might flow from increased use of indecent language.

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between 6:00 a.m. and midnight." *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 665 (D.C. Cir. 1995). Protecting the welfare of children, therefore, would call for strengthening, not weakening the indecent language restrictions.

[3] Ted Turner, owner of Turner Network Television (TNT), testifying on the "Impact of Media *Violence* on Children" to the Senate Committee on Commerce, Science and Transportation, described the massive influence of media on child development and the pressure placed upon broadcasters to lower standards and gain a competitive edge: "We've eased up [media standards] because we are being forced to by the competition... They're guilty of murder. We all are—me too." WASH. POST, June 26, 1983, at B3.

II. THE FCC'S DECENCY STANDARDS FURTHER THE COMPELLING STATE INTEREST IN SAFEGUARDING CHILDREN WHILE STILL PRESERVING BROADCASTERS' FREE SPEECH RIGHTS.

The eminent reasonableness of the FCC's decency standards is brought into sharp focus when viewed in the context of this Court's and circuit court precedents which affirm the state's compelling interest in protecting the well-being of children. In some instances, particularly with regard to public education, the state's interest in the well-being of children has clashed with the parent's right to direct the upbringing of their children, and state interests have prevailed. *See, e.g., Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 529 (1st Cir. 1995) (rejecting parents' challenge to their children's mandatory attendance at an explicit AIDS awareness assembly that graphically demonstrated various sexual acts); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1200 (9th Cir. 2005), *amended by*, 447 F.3d 1187 (9th Cir. 2006), *cert denied*, 549 U.S. 1089 (2006) (rejecting parents' challenge to invasive sexual questions appearing in a student questionnaire, finding that parents do not have

a fundamental right to direct how a public school teaches their children about sexuality or any other topic). However, in the context of exposing children to indecent language or materials in the media, the state's interest in the well-being of children and the parents' right to direct the upbringing of their children have coalesced to provide a hedge of protection against infiltrating young minds with indecent words and images. *See Ginsberg v. New York*, 390 U.S. 629, 639, (1968) (relying upon both the parental right and compelling state interest in upholding a statute restricting the sale of pornography to minors). The FCC's decency standards are part of that hedge of protection which should not be breached as the broadcasters request.

A. This Court Has Established That Indecent Speech Can Be Regulated In The Broadcast Context To Protect The State's Compelling Interest In Protecting The Well-Being Of Children.

When analyzing questions regarding exposing children to sexual or other explicit content, courts have differentiated not only between public education and the media, but also among the various types of media. *FCC v.*

League of Women Voters, 468 U.S. 354, 376 (1984). "Because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media." *Id.* This Court has found that the interest in shielding viewers from unwanted exposure to indecent words or images can supplant the free speech rights of broadcasters, but not of people on the street. *Compare FCC v Pacifica Found.*, 438 U.S. 726, 750 (1978) (holding that broadcaster cannot air "seven dirty words" monologue during afternoon drive time), *with Cohen v California*, 403 U.S. 15, 18 (1971) (holding that court visitor cannot be prosecuted for wearing a jacket containing the words "F*** the Draft"). This Court has recognized that the ubiquity of broadcast media and its accessibility even to those who cannot read or write justifies restrictions upon indecent content. Rigorous research on brain development and the effects of words and images on underdeveloped brains further demonstrates the need to retain or even expand those restrictions.

Congress declared the 1990s "The Decade of the Brain."[4] The scientific community has

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[4] *See* PROJECT ON THE DECADE OF THE BRAIN, http://www.loc.gov/loc/brain/ (last visited August 22, 2011).

learned more about the body's executive organ in the last thirty years than in all of history.[5] The scientific consensus is that "inhibition rather than excitation is the hallmark of the healthy brain." Our brains obey "a law of strength."[6] The brain must commonly filter about 100 million messages per second,[7] and stronger scary or 'hot' stimuli are extracted over less strong factual, cool stimuli.[8] This means as the brain's neurochemical pathways are chemically reshaped by strong, obscene messages that language causally "effects" changes in a child's brain, mind and memory development.

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[5] *Id.*

[6] *See* 2004 *Testimony: The Science Behind Pornography Addiction*,, http://www.drjudithreisman.com/archives/2011/06/2004_testimony_1.html citing, *e.g.*, Richard Restak, *The Mind*, 283 (1988) ("Inhibition rather than excitation is the hallmark of the healthy brain. If all of the neurons in the brain were excitatory we would be unable to do something as simple as reaching out for a glass of water.").

[7] *See, e.g., Jack Fincher, The Human Body: The Brain: Mystery of Matter and Mind*, 122-23 (Roy B. Pinchot ed.) (1984).

[8] *See, e.g., Michael Sweeney, Brain: The Complete Mind*, 147, 215 (2009).

1. Recognizing the harm that indecent language inflicts on children, this Court has upheld narrowly tailored restrictions on such language in the media.

As this Court said in *Pacifica Found.*, "broadcasting is uniquely accessible to children, even those too young to read." 438 U.S. at 749. Therefore, while Mr. Cohen's written message (F*** the Draft on his jacket) might have been incomprehensible to a first grader, Pacifica's broadcast of George Carlin's monologue describing the "seven dirty words" you cannot say on television "could have enlarged a child's vocabulary in an instant." *Id.* (citing *Cohen*, 403 U.S. at 18). Media providers such as bookstores and newsstands can withhold indecent printed materials from young people without denying adults access to the materials. *Id.* However, that is not the case with radio and network (non-cable over the air) television broadcasts, which instantly transmit images and words to an entire audience with no effective means of shielding children from indecent content while providing access to adults. *Id.* That difference, coupled with the "government's interest in the 'well-being of its

youth' and in supporting 'parents' claim to authority in their own household'" justify special treatment of indecent broadcasting. *Id.* at 750 (citing *Ginsberg* 390 U.S. at 639-40).

As this Court explained in *Ginsberg*, "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations . . . upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful." 390 U.S. at 639. "First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). "The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.*In addition, society has an independent, transcendent interest in protecting the welfare of children which also justifies special statutory regulation of the dissemination of pornography to children. *Id.* at 640.

The prevention of sexual exploitation and abuse of children constitutes "a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982). "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Id.* at 756 (citing *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)). Accordingly, this Court has sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. *Id.*

In *FCC v. Fox*, this Court upheld the FCC's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words, rather than addressing only repeated uses. *FCC v. Fox*, 129 S. Ct. at 1812. "Even isolated utterances can be made in 'pander[ing,] ... vulgar and shocking' manners, and can constitute harmful 'first blow[s]' to children." *Id.* (citations omitted).

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are

> intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. . . . .It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe–or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.

Id. at 1812-13 (citation omitted). Even when the FCC had not adduced any quantifiable measure of the harm caused by the "seven dirty

words" in George Carlin's monologue, and even before the extant confirming data on the actual re-shaping of the child's malleable brain, the Supreme Court held that "government's interest in the 'well-being of its youth' . . . justified the regulation of otherwise protected expression." *Id.* at 1813-14 (citing *Pacifica*, 438 U.S. at 749). That interest also justifies rejecting the broadcasters' claim that the prohibition against broadcasting indecent words or images between 10 p.m. and 6 a.m. should be rejected as "vague."

2. Courts have established that placing a time restriction on the broadcast of indecent language is a narrowly tailored response to the state's compelling interest in protecting children.

Finding that there is a compelling state interest in protecting the physical and psychological well-being of minors addresses only part of the question of whether the decency standards are constitutional. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Unlike material defined as obscene,

sexual expression which is defined as "indecent" is protected by the First Amendment. *Id.* Therefore, the government can regulate its content only if it chooses the least restrictive means to further the articulated compelling interest. *Id.* This means that the regulations must be narrowly drawn to serve those interests without unnecessarily interfering with First Amendment freedoms. *Id.* The FCC's complete ban on certain telephone communications was not narrowly tailored and therefore improper. *Id.*

By contrast, the FCC regulation in *Pacifica,* which did not ban broadcasting of the "seven dirty words" outright, but instead restricted when they could be aired, was found to be narrowly tailored. *Id.* at 127; *Pacifica,* 438 U.S. at 750–51. Due to the unique pervasiveness of the broadcast media and the accessibility of the messages to children, this Court has afforded broadcasting the most limited First Amendment protection and has repeatedly rejected broadcasters' claims that the restrictions should be lifted. *Pacifica,* 438 U.S. at 750-51. Therefore, in the broadcast context, the FCC may, in appropriate circumstances, place restrictions on the broadcast of indecent speech. As was true in *Pacifica*, the Court here is addressing merely a time restriction, not an outright ban, and,

therefore, should uphold the restriction as a narrowly tailored means of achieving the state's ends of protecting young people from indecent language, images and collateral ideations.

B. Research Regarding Brain Development And Observational Learning Underscore The Need To Protect Young People In Particular From Even Fleeting Utterances Of Indecent Language.

Research on adolescent brain development and on the connection between the broadcast of indecent words and images and harmful behavior buttress this Court's findings upholding regulations aimed at lessening children's exposure to indecent images and words via broadcast media. The brain studies show that the portion of the brain which controls impulses and complex decision making is the last to develop and is not mature until the early 20s. Therefore, young people frequently immaturely process harmful or indecent presentations or appropriate versus inappropriate speech. Studies show that hearing indecent language in the media in a context that appears to be socially acceptable creates a proliferation of profanity, much like a

contagion, which can trigger anti-social, even harmful, behavior.

> [S]ocial scientific research has largely confirmed the thesis that affect, attitudes, beliefs and behaviour can indeed spread through populations as if they were somehow infectious. Simple exposure sometimes appears to be a sufficient condition for social transmission to occur. This is the social contagion thesis; that sociocultural phenomena can spread through, and leap between, populations more like outbreaks of measles or chicken pox than through a process of rational choice.
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> The results of contagion research suggest that just as we do not choose to be infected with, and pass on, biological contagions, we often behave as if we have little control over the culture we become infected with and consequently spread. Such an observation undermines the traditional understanding of the human subject as an autonomous agent whose action is defined by individual intentionality

> and rational evaluation. Whilst we may like to believe that we consciously and rationally decide on how to respond to situations, social contagion evidence suggests that some of the time this is simply not the case. Rather than generating and "having" beliefs, emotions and behaviours, social contagion research suggests that, in some very real sense, those beliefs, emotions and behaviours "have" us.[9]

The contagious nature of popular culture is of particular concern in light of the recent research on the adolescent brain. Dr. Jay N. Giedd of the National Institute of Mental Health has presented the findings of more than 20 years of neuro-imaging of adolescent

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[9] Paul Mardsen, *Memetics and Social Contagion, Two Sides of the Same Coin?* 2 THE JOURNAL OF MEMETICS: EVOLUTIONARY MODELS OF INFORMATION TRANSMISSION 2 (1998), *available at* http://cfpm.org/jom-emit/1998/vol2/marsden_p.html (last visited August 22, 2011).

brains.[10] The magnetic resonance imaging studies show that the frontal "new" brain matures later than other brain structures.[11] This late-maturing portion controls "executive functioning," *i.e.*, attention, inhibition, regulation of emotion, organization and long-range planning.[12]

Building upon the imaging studies, researchers find that the brain is not fully developed at puberty as was once believed.[13] Instead, mature brain development is attained at roughly age 24.[14] As Dr. Giedd noted, one of the last areas of the brain to mature is the prefrontal cortex, which is responsible for the complex processing of information, including making judgments, controlling impulses, foreseeing consequences and setting goals and

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[10] Jay N. Giedd, M.D., *The Teen Brain: Insights from Neuroimaging*, 42 J. OF ADOLESCENT HEALTH 335, 340 (2008).

[11] *Id.*

[12] *Id.*

[13] Ken C. Winters, Ph.D., *Adolescent Brain Development and Drug Abuse*, A Special Report Commissioned by the Treatment Research Institute 1 (November 2004), *available at* www.tresearch.org/resources/specials.htm (last visited August 17, 2011).

[14] *Id.*

plans.[15] The still-developing brain, *e.g.*, acting impulsively and ignoring negative consequences, is implicated in teen abuse of drugs, alcohol and pornography, refortifying the wisdom of delaying adolescents' exposure to harmful influences.[16] In the same vein, the under-development of the adolescent brain points to the wisdom of delaying exposure to indecent language which, as this Court observed, Congress has determined is harmful to children. *FCC v. Fox*, 129 S. Ct. at 1812-13. The harmful effects of indecent language are further borne out by research, as discussed below.

Psychologists point to three major aspects of brain development that help explain how early exposure to indecent words and images has long-lasting consequences.[17] First,

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15 *Id.* at 2.

16 *Id.* at 3-4.

17 David Walsh, Ph.D. & Douglas Gentile, Ph.D., *Slipping Under the Radar: Advertising and the Mind*, *in* L. Riley & I. Obot (Eds.) *Drinking it in: Alcohol Marketing and Young People*. Geneva, Switzerland: World Health Organization, *available at* http://www.psychology.iastate.edu/faculty/dgentile/publications.htm (last visited August 17, 2011).

experience plays a key role in how the brain is wired.[18] Inputs from all childhood experiences sculpt the finer elements of the developing neural network.[19] Second, the "lion's share of the wiring happens in the early years of a child's life."[20] These first two points illustrate why children's minds are so impressionable and why children are so susceptible to outside influences.[21] Finally, emotion plays a leading role in how the mind works by focusing attention, shaping attitudes and determining what is remembered.[22] Consequently, when indecent language is broadcast during times when children are listening or viewing, that language is sculpted into their brain's wiring. If there is emotion associated with the word, such as someone being angry or excited, then the child's attention is piqued and the word becomes more memorable. Limiting children's exposure to indecent words and images, such as through the decency standards at issue in this case, can lessen the effects of the words and further the state's interest in protecting the psychological well-being of children and youth.

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18 *Id.* at 3-4.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

Social science research additionally confirms the truth of this Court's observation that children mimic the behavior they observe. *See FCC v. Fox*, 129 S. Ct. at 1812-13. Researchers have found that observational learning plays a significant role in cognitive development.[23] "By observing others' behaviors, including media figures, one may develop rules to guide his or her own subsequent actions or be prompted to engage in previously learned behavior, or both."[24] A person who regularly sees or hears a media star or other person whom they admire using indecent language with impunity will translate the presentation as acceptance or approval of the behavior, *i.e.*, using indecent language. Marketing studies further exemplify the concept, as they reveal that as few as 2½ percent of people can influence the majority of people to adopt certain beliefs or behaviors over time.[25] Since children's developing minds are particularly susceptible

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[23] Robin L. Nabi & Marina Krcmer, *Conceptualizing Media Enjoyment as Attitude: Implications for Mass Media Effects Research*, 14 COMMUNICATION THEORY 288 (November 2004).

[24] *Id.* at 302.

[25] Judith A. Reisman, Ph.D., *Sexual Sabotage*, 283 (2010) (citing Philip Kotler, *Marketing Management*, 345 (1988)).

to such outside influences,[26] children are particularly vulnerable to the effects of hearing celebrities utter indecent language. Consequently "[p]rogramming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." *FCC v. Fox*, 129 S. Ct. at 1812-13. The FCC's decency standards help prevent at least some of the indecent language from reaching and becoming imprinted in the young brains, thereby furthering the state's interest in protecting the welfare of its youngest citizens.

As even fleeting images or words attached to images can become imprinted into developing brains, even a modest reduction in the use of indecent words can reap significant benefits. The human brain links visual to motor neurons, so that when someone watches an event his body physically mirrors the excitement felt if he were actually involved in the event.[27] "Actual touch and the observed touch elicited similar activity in the subjects' secondary somato-sensory cortex, an area involved in processing touch . . . . It's as if the

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26 Walsh & Gentile at 3-4.

27 Reisman at 143.

brain translates vision into sensation."[28] A person can watch someone drink a cup of tea and the same areas of the brain will activate as if he were drinking that tea.[29] Words usually connote certain images and those images become cemented into the wiring of the brain.[30] A word which is in a person's head as an electrical signal for no more than a few seconds can leave a trace (of both it and the images associated with it) that will last for years.[31]

That can be especially problematic for children who are particularly susceptible to outside influences and whose under-developed cognition is particularly malleable. An indecent word fleeting into the child's mind through a television broadcast, it will become part of his mind. If he does not understand the word, he might ask a parent or other adult for an explanation. However, in today's digital age, a

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[28] Greg Miller, *Reflecting on Another's Mind*, 308 SCIENCE 945-47 (May 13, 2005).

[29] Nicola Sater Alipanah, *Unraveling the mysteries and marvels of the brain*, WASH. TIMES, November 12, 2006, at B08.

[30] Reisman at 327.

[31] Richard Restak, The Brain, "Learning & Memory," the Anneberg/CPB Collection, WNET/New York, (1984) (quoting University of California researcher Gary Lynch).

youngster is just as likely to type the word into an internet search engine and be instantly inundated with thousands of images. Those images will then become cemented to the word in the child's mind and memory. For example, each word at issue in this case was searched on Google images. All resembled the following sample for the word "f***." This harassing word retrieved about 136 million results in .20 seconds, including people raising their middle finger, people engaged in sexual acts and even infants and animals appearing to make an obscene gesture.[32] The child's vocabulary, mind and memory are changed in an instant. *See Pacifica Found.*, 438 U.S. at 749. Limiting the broadcast of such words to the hours of 10 p.m. to 6 a.m. diminishes such instantaneous expansion of children's vocabulary, mind and memory and protects their physical and psychological well-being.

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[32] Google images search conducted August 18, 2011. GOOGLE, http://google.com/imghp.

III. THE DECENCY STANDARDS ACT AS A BULWARK AGAINST THE NORMALIZATION OF PROFANITY AND INDECENCY WHICH DETRIMENTALLY AFFECTS ALL CITIZENS, BUT PARTICULARLY WOMEN AND CHILDREN.

Maintaining the FCC's decency standards is critical for much more than helping to prevent exposure to and use of indecent language by children. Studies have shown that profanity is a form of verbal aggression that frequently escalates into physical aggression. Indecent language is also used to demoralize women and children during physical and sexual abuse and has contributed to the downward slide of popular culture and civil society. The decency standards cannot erase all use of profanity or its effects, but to the extent that they can block the downward progression they are serving the state's compelling interest in the health and well-being of its citizens.

A. Profanity Is A Form Of Aggression Which Leads Which Is Mimicked By Children.

Researchers' findings regarding social learning and television viewing offer further

AMICUS CURIAE BRIEF

RECORD
AND
Br.

No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.
v.
ABC, INC., ET AL.

On Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE E.W. SCRIPPS COMPANY IN SUPPORT OF RESPONDENTS

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
Kristen Rasmussen
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209-2100
(703) 807-2100

(Additional counsel for amici listed in Appendix B)

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. The Court should take this opportunity to find that the news exemption and its standardless application do not adequately protect speech at the heart of the First Amendment, and to do so any indecency standard must reflect modern changes in the media industry 3

A. The indecency policy's news exemption vests the commission with unbounded discretion to decide what speech to allow and disallow. 4

B. This discriminatory application of the news exemption severely restrains the ability to effectively report on matters of public interest and concern. 9

C. An increased blurring of the distinction between news and entertainment programming indicates that the current broadcast indecency enforcement scheme is unworkable. 11

II. Excessive fines imposed under the indecency policy increase its threat to First Amendment-protected speech and are of dubious constitutionality given this Court's excessive fines and punitive damages jurisprudence. 15

A. Fines for indecency violations could put some broadcasters out of business..... 16

B. Such harsh penalties are disproportionate to the severity of the indecency violations and fines imposed for comparable misconduct. 17

III. The Court should take this opportunity to find that broadcasters, much like most other mass media, are able to regulate themselves such that content control by the government is unnecessary.....21

A. Despite an absence of government regulation, the print media closely monitor themselves to ensure that indecent material, save for those exceedingly rare situations where the public cannot be fully informed about an important issue without its use, is precluded from publication. 22

B. Not immune from internal and external market pressures, cable broadcasters regulate indecency in their programming. 25

C. Effective self-regulatory measures already in place in the broadcast industry indicate that the mass medium, much like its print and cable counterparts, is capable of regulating itself in a manner that obviates the need for government oversight. 27

CONCLUSION 31

APPENDIX A: Descriptions of *amici* 1a

APPENDIX B: Additional counsel 2a

TABLE OF AUTHORITIES

Cases

Associated Press v. United States
326 U.S. 1 (1945) 10

Austin v. United States
509 U.S. 602 (1993) 18

BMW of N. Am., Inc. v. Gore
517 U.S. 568 (1996) 19, 20

Brown v. Entm't Merchs. Ass'n
131 S. Ct. 2729 (2011) 21, 22

Citizens United v. Fed. Election Comm'n
130 S. Ct. 876 (2010) 10, 11

Fed. Commc'ns Comm'n v. Pacifica Found.
438 U.S. 726 (1978) 8

Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n, 613 F.3d 317 (2d Cir. 2010) 4, 29

Miami Herald Publ'g Co. v. Tornillo
418 U.S. 241 (1974) 10, 15, 23

N.Y. Times Co. v. United States
403 U.S. 713 (1971) 9

Snyder v. Phelps
131 S. Ct. 1207 (2011) 11, 31

United States v. Bajakajian
524 U.S. 321 (1998) 18

United States v. Playboy Entm't Group, Inc.
529 U.S. 803 (2000) 14

Constitutional Provision

U.S. Const. amend. VIII 17

Statutes

2 U.S.C. § 434(f)(3)(B)(i) 10

Pub. L. No. 109-235, 120 Stat. 491 16

Other Authorities

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Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005
21 F.C.C.R. 2664 (2006) 7

Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005
21 F.C.C.R. 13299 (2006) 4, 6, 19

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17 F.C.C.R. 18347 (2002) 7

In re Entercom Seattle License, LLC
19 F.C.C.R. 9069 (2004) 6

In re Request for Declaratory Ruling by Paramount Pictures Corp., et al., 3 F.C.C.R. 245 (1988) 14

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6 F.C.C.R. 610 (1991) 20

Lili Levi, *A New Model for Media Criticism*
61 U. Miami L. Rev. 665 (2007).....12, 13

Lili Levi, First Amendment Ctr., *The FCC's Regulation of Indecency* (2008) 6

Maria Matasar-Padilla, Note, *Music Lessons: What Adam Lambert Can Teach Us About Media Self-Regulation*, 29 Cardozo Arts & Ent. L.J. 113 (2011).....24, 29, 30

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L.A. Times, July 5, 2006 17

Allison Romano, *Reporting Live. Very Carefully.* Broadcasting & Cable, July 3, 2005 20

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Allan M. Siegal, New York Times Manual of Style and Usage (1999) 23

Sports Talk, Atlanta J. & Const., Sept. 14, 2011.. 20

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Howard W. Waltzman, *Federal Communications Commission Lacks the Authority to Reclassify Broadband Services As Information Services* 14 No. 10 J. Internet L. 1 (2011) 12

Washington Post Deskbook on Style (1989) 23

Richard E.Wiley et al., *Communications Law 2004: Contentious Times in a Shifting Landscape* 811 PLI/Pat 109 (2004) 16

Jonathan Yardley, *Entertainment? That's News to Me*, Wash. Post, Feb. 3, 1997 13

Young Broad. of S.F., Inc. 19 F.C.C.R. 1751 (2004) ..... passim

STATEMENT OF INTEREST[1]

As advocates for the rights of the news media and others who seek to provide information to the public about important issues that affect them, *amici curiae* (described in Appendix A) have a strong interest in ensuring that the First Amendment guarantee of a free press is protected to the fullest extent. *Amici* believe this Court's long-standing jurisprudence strongly supports a finding that the current standard adopted and enforced by the Federal Communications Commission ("FCC" or "commission") to regulate broadcast indecency is unconstitutionally vague, despite the policy's exemption from indecency liability for material contained in bona fide news or public affairs programming. The news exception and its standardless application do not adequately protect speech at the heart of the First Amendment's protections.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief; and counsel for Petitioners and Respondent s have filed blanket written consents to the filing of *amicus curiae* briefs in this matter.

SUMMARY OF ARGUMENT

Amici curiae urge the Court to affirm the decision below and take this opportunity to clarify that the indecency policy's news exemption, rather than saving the enforcement scheme from unconstitutionality, suffers from its same standardless manner of enforcement. And the effect is an impermissible intrusion into the editorial affairs of broadcasters that severely restricts their ability to report on matters of significant public interest and concern. A bright-line rule exempting fleeting expletives, in whatever format presented, from broadcast indecency regulations is the only means to ensure that news media, as they exist in a modern media landscape, can fulfill their constitutionally protected role as a vital source of public information.

Excessive fines that potentially put news broadcasters out of the business of speaking entirely compound the danger of unbounded official discretion to regulate content. In accordance with the Court's excessive fines and punitive damages jurisprudence, indecency fines that are highly disproportionate to the underlying violation and resulting harm and not in line with penalties imposed for comparable conduct are of dubious constitutionality.

A system of self-regulation by the broadcast industry is a feasible alternative to strict government regulation. Long-time self-policing efforts by broadcasters and their mass media counterparts indicate that such a regime would effectively balance the government's legitimate interest in shielding children from indecent programming and the

protections the First Amendment provides for the news media.

ARGUMENT

I. The Court should take this opportunity to find that the news exemption and its standardless application do not adequately protect speech at the heart of the First Amendment, and to do so any indecency standard must reflect modern changes in the media industry.

The FCC contends that uncertainty regarding its application of indecency standards to news programming is irrelevant to the proper disposition of this case because "there is no serious argument that the live broadcast of a Billboard Music award for 'Top 40 Mainstream Track' by Nicole Richie and Paris Hilton was 'news' or 'public affairs programming.'" Pet'r's Br. 30–31. But this assertion about the offending material at issue goes to the heart of Respondents' claim against the commission: Its indecency policy relies on subjective judgments by the commission, including its estimation of whether material qualifies as news or public affairs programming subject to the exception, that render it unconstitutionally vague.

As such, the Court should consider the news exemption and find its standardless application an intolerable restraint on the very type of speech entitled to special protection. A bright-line rule stating that broadcast indecency regulations cannot be applied to instances of fleeting expletives, in whatever format presented, would protect a news broadcaster's First Amendment rights while allowing the

government to punish unscrupulous broadcasters. This decision must be guided not by increasingly difficult-to qualify exemptions but rather by a recognition that constitutionally protected speech about important public issues is now disseminated in a variety of formats dictated by technological changes in the modern media industry.

A. The indecency policy's news exemption vests the commission with unbounded discretion to decide what speech to allow and disallow.

As the FCC recognizes, the matters presented in news and public affairs programming are at the core of the First Amendment's free press guarantee. *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 13299, 13327 (2006) [hereinafter *Remand Order*]. As such, the commission has declared it "imperative that [it] proceed with the utmost restraint when it comes to news programming." *Id.* However, FCC indecency findings belie this claim of restrained approach. Indeed, the decisions reveal determinations of indecency based on an assessment of the quality of the programming — an unconstitutionally discriminatory manner of enforcement in which favored speech is permitted and disfavored speech is sanctioned.

The FCC claims the exemption from indecency liability for statements made during a bona fide news interview should adequately assuage broadcasters' fear that news programming could be subject to fines. *Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n*, 613 F.3d 317, 334 (2d Cir. 2010). Yet, one need look no further than the com-

mission's explicit reiteration that news status does not absolve a broadcast from a finding of indecency for ample proof of why the exception provides little comfort to news programmers: "To be sure, there is no outright news exemption from our indecency rules." *Remand Order*, 21 F.C.C.R. at 13327. Even absent this unequivocal assertion of the commission's discretion to decline to apply the news exemption, its indecency decisions sufficiently strip broadcasters of any assurance that news programming is immune from liability. For example, the FCC first deemed content in a news program indecent in 2004, when it imposed a fine for the momentary airing of a penis during a live interview on a morning news show with performers from a comedy stage. *Young Broad. of S.F., Inc.*, 19 F.C.C.R. 1751, 1751–52 (2004). The news program's hosts repeatedly warned viewers of the subject matter of the upcoming interview segment and immediately apologized after the accidental and unintentional exposure, which lasted less than a second and for which involved station personnel were suspended. *Id.* at 1752–53, 55. Nonetheless, the FCC found the broadcast to be "pandering, titillating and shocking." *Id.* at 1756–57. Moreover, broadcasts featuring "shock jock" Howard Stern amassed more than $2 million in indecency fines or settlements, despite a declaratory statement that his on-air interviews were "*bona fide* news interviewing programming" for purposes of the equal time rule. *In re Infinity Broad. Operations Inc.*, 18 F.C.C.R. 18603, 18604 (2003).

While neither of these examples risk confusion with stories about economic conditions or foreign affairs developments, the broader point is still important: There is no clear standard that enables

broadcasters to know what material they can safely air in that vast gray area between these extremes. Thus, despite the FCC's promises of a hands-off approach, news broadcasters cannot be confident about the immunity of their programming.

The FCC has expressed a willingness to rely on broadcasters' characterizations of their own programming as news programming in making indecency determinations. *Remand Order*, 21 F.C.C.R. at 13328 (deferring to CBS' "plausible characterization" of an interview of a reality television contestant who uttered the word "bullshitter" on "The Early Show" as a bona fide news interview). Yet, the commission has seemingly tasked itself with distinguishing between plausible and implausible broadcaster claims about the nature of the programming, making its own assessment of the newsworthiness, or lack thereof, of any news story with a sexual component. Lili Levi, First Amendment Ctr., *The FCC's Regulation of Indecency* 26 & n.142 (2008).[2] For example, the commission denied an application for review of an Enforcement Bureau finding that a discussion of whether a penis could be used to pull objects was indecent. *In re Entercom Seattle License, LLC*, 19 F.C.C.R. 9069, 9069 (2004). Although the station claimed the non-sexual references to male genitalia were made "in the context of a genuine news story," and the Enforcement Bureau conceded the discussion concerned a news item, the commission stated its view that "the material [was] not a *bona fide* newscast." *In re Enter-*

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[2] *Available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_.final_.pdf.

com Seattle License, LLC, 17 F.C.C.R. 18347, 18349–50 (2002).

The commission also rejected the claim that the puppetry segment should not be found indecent because it aired during a morning news show. *Young Broad.*, *supra*, at 1755. In its Omnibus Order, the commission distinguished the momentary exposure of a flood victim's penis during another morning news show excerpt from the puppetry footage:

> [T]he [puppetry] display was not incidental to the coverage of a news event; rather, it occurred during an interview of performers who appear nude to manipulate their genitalia, and as the performer stood up to give an off-camera demonstration to the show's hosts. Here, in contrast, the [flood] program's focus is a rescue effort, and the complained-of material is incidental and easily could evade the notice of a viewer focused on this effort.

Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. 2664, 2717 (2006) [hereinafter *Omnibus Order*].

Concededly, a typical viewer may very well agree with the commission on this distinction. But it is a distinction that must be left to the producers and directors of news programming, not the government.[3] In this case, the distinction between a context in which the momentary airing of a penis

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[3] For further discussion of the FCC's interference with broadcast journalists' editorial discretion, see *infra* Part I.B.

was appropriate and that in which it was indecent was seemingly an easy call for the government, and many broadcast journalists faced with the same editorial decision would likely come to the same result without great difficulty. However, journalism presents few instances in which the distinction between appropriate and inappropriate material is so easily discernible. In those situations where difficult decisions about whether to include particular material in a news report must be made, it is particularly crucial that the determination lie solely with the journalist in the exercise of his editorial discretion and judgment. As such, the government cannot be vested with the authority to make distinctions between decent and indecent content, even when the determination is likely an easy one.

Thus, the commission's decisions about whether the indecency policy's news exemption shields programs from liability often appear to be informed by the commission's evaluation of a program's merit — a "visage of . . . censor[ship that] is all too discernible . . . ." *Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. 726, 766 (1978) (Brennan, J., dissenting). The policy's failure to "carefully define and narrow official discretion," *id.* at 748 (plurality opinion), results in an unconstitutionally discriminatory manner of enforcement.

B. This discriminatory application of the news exemption severely restrains the ability to effectively report on matters of public interest and concern.

Under the FCC's inherently boundless discretion, a news broadcaster's journalistic discretion to choose how it will inform its viewers is replaced by the commission's own highly subjective belief about whether a particular program is of high or low quality, tasteful or distasteful. That is, the policy severely restricts a news broadcaster's ability to report on matters that, although of significant public interest and concern, may displease or offend the FCC — a restraint on publication that this country, consistent with its recognition "that a press that is alert, aware, and *free* most vitally serves the basic purpose of the First Amendment," cannot tolerate. *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (per curiam) (emphasis added).

An impossible-to-predict, discriminatory manner of indecency enforcement means protection for broadcasts about matters of public concern extends no further than a mere government assurance that "we may fine you for indecent comments, though we are cautious not to, but we still might," a standard that provides no guarantee of protection at all. This lack of reliable guidance as to what material is protected by the indecency policy's news exemption effectively grants the government a seat in the editing rooms of news broadcasters nationwide. Much like other important considerations — the timing of a particular event or the public status

of the subject of a report, for example — the potential to incur large fines informs daily decisions about what information is widely disseminated and what information is withheld from public view. And the effect is to leave viewers and listeners less than fully informed.

Choices about the content of broadcast news reports and their treatment of public issues constitute the exercise of editorial control and judgment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Yet, to the extent those decisions are guided not by the broadcasters' discretion to publish over the airwaves that "which their 'reason' tells them should ... be published," *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945), but rather by a concern about massive indecency fines or even loss of their licenses, the government impermissibly "meddle[s] in the internal editorial affairs" of broadcasters. *Tornillo*, 418 U.S. at 259 (White, J., concurring).[4] Interference with "this crucial process," *id.* at 258 (majority opinion), often results in self-censorship[5] of serious news programming about matters of public concern — speech that "oc-

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[4] In other contexts, regulations that infringe the news media's ability to exercise editorial discretion have, as a constitutional matter, exempted the press. For example, even before this Court's ruling in *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), the Bipartisan Campaign Reform Act of 2002 expressly exempted the news media from its prohibition on corporate electioneering communications. 2 U.S.C. § 434(f)(3)(B)(i).

[5] Pursuant to Supreme Court Rule 37.1, *amici* do not repeat the ample evidence Respondents and fellow *amici* provide to show that the vagueness of the FCC's indecency policy has chilled protected speech, but do incorporate those numerous examples by reference.

cupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011) (internal citation and quotation marks omitted).

As such, indecency regulations that implicate these constitutional rights must, at a minimum, be enforced in accordance with consistently applied standards that enable news and public affairs broadcasters to predict with reasonable certainty what material in any particular broadcast would be protected by the indecency policy's news exemption. Absent clear guidelines, the policy "threat[ens] . . . the free and robust debate of public issues . . . potential[ly] interfere[s] with a meaningful dialogue of ideas" and poses the risk of "a reaction of self-censorship" on matters of public import. *Id.* (internal citation and quotation marks omitted).

C. An increased blurring of the distinction between news and entertainment programming indicates that the current broadcast indecency enforcement scheme is unworkable.

As this Court recently noted, "the advent of the Internet and the decline of print and broadcast media" have "blurred" lines in the media landscape in ways that must be considered when evaluating regulations that affect the gathering and dissemination of news. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 905–06 (2010). Indeed, this evolution in the industry is highly relevant to an analysis of the FCC's regulatory power.

As a preliminary matter, the FCC's authority to regulate content generally and news program-

ming specifically may be expanding in light of its proposal to regulate broadband services in a manner that could impose common carrier-style requirements on the companies that provide access to the Internet. The commission did abandon its "Third Way" of regulation, which would have reclassified broadband Internet access service as a "telecommunications service" under Title II of the Communications Act, saying it could achieve its goal of "preserv[ing] the freedom and openness of the Internet" without the negative consequences of broad application of Title II. *See* Julius Genachowski, Chairman, Fed. Commc'ns Comm'n, Remarks on Preserving Internet Freedom and Openness (Dec. 1, 2010).[6] Yet, questions remain about the FCC's authority to impose network management obligations on broadband providers under Title I of the act, raising suspicion that the commission may revisit its earlier proposal to regulate broadband services under the more stringent Title II. Howard W. Waltzman, *Federal Communications Commission Lacks the Authority to Reclassify Broadband Services As Information Services*, 14 No. 10 J. Internet L. 1, 6–7 (2011). Before the situation is complicated by such a development, however, the Court should take this opportunity to strike down a policy that infringes the First Amendment protections for news media as they exist in the broadcasting context.

Technological changes in the modern media industry and the economic consequences of those changes have drastically affected news reporting. Lili Levi, *A New Model for Media Criticism*, 61 U.

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[6] *Available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303136A1.pdf.

Miami L. Rev. 665, 681–82, 688 (2007). One of the most significant, and criticized, aspects of this changed environment is a blurring of the distinction between news and entertainment programming, a trend caused largely by 24-four hour cable news services. *Id.* at 686–88; *see also* Jonathan Yardley, *Entertainment? That's News to Me*, Wash. Post, Feb. 3, 1997, at D2 ("[T]he likes of ABC's 'PrimeTime Live' are not journalism but entertainment, not news reports but shows. . . . Television, a medium of images and emotions rather than words and ideas, by its very nature reduces everything it touches to show business[.]"). Despite allegations that economic pressures have negatively affected the quality of broadcast news reports, the reality remains that matters of public importance are increasingly presented in formats that resemble entertainment as much as journalism.

To be sure, *amici* do not contend that an utterance about cow excrement in a designer handbag necessarily constitutes a matter of public importance. But the incident is a strong example of the danger, given technological advancements that have changed the ways in which news is disseminated, of authoritative assertions that certain kinds of material cannot "serious[ly]" be considered news. Pet'r's Br., *supra*. Undoubtedly, the bestowing of awards that indicate success and prestige in a multi-billion dollar industry constitutes a matter of public importance, at least in the entertainment area. Would the same material be considered news if it were presented not in live entertainment programming but in a syndicated program that provided spot news coverage and news interviews about entertainment? In another context, the commission found that such programming was a bona

fide newscast. *In re Request for Declaratory Ruling by Paramount Pictures Corp., et al.*, 3 F.C.C.R. 245, 246 (1988) (holding that "Entertainment Tonight" and "Entertainment This Week" were exempt from the equal opportunities requirement of § 315 of the Communications Act).

These questions indicate that now more than ever broadcast indecency determinations must be governed by more than summary conclusions about a program's news status. In fact, nothing less than a policy guided not by increasingly difficult-to-qualify exemptions but by a recognition that constitutionally protected speech about important public issues is now disseminated in a variety of formats dictated by an ever-evolving media landscape will ensure that vital reporting about matters of public interest and concern remains robust. As such, the Court should adopt a bright-line rule that broadcast indecency regulations cannot be applied to instances of fleeting expletives, in whatever format presented. Concededly, "speech that many citizens may find shabby, offensive, or even ugly" or that the government concludes "is not very important" may reach the public airwaves under this standard. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000). But as the distinction between news and other types of programming promises to become even murkier as the practices, methods and modes of journalism continue to evolve alongside future technological advancements, such a clearly enunciated standard is necessary to protect important speech on public issues.

The indecency policy's news exemption does not save the regime from its vagueness. On the contrary, the discriminatory manner in which it is enforced severely restricts a news broadcaster's abil-

ity to report on matters of significant public interest and concern that the FCC may, in its sole estimation, find objectionable. As such, the government impermissibly "insinuate[s] itself into the editorial rooms of this Nation's [broadcasting] press." *Tornillo*, 418 U.S. at 259 (White, J., concurring). A holding that First Amendment protections extend to important speech presented in a variety of different modes is the only means to ensure that the news media, as they exist in a modern media landscape, can fulfill their constitutionally protected role as a vital source of public information.

II. Excessive fines imposed under the indecency policy increase its threat to First Amendment-protected speech and are of dubious constitutionality given this Court's excessive fines and punitive damages jurisprudence.

As the above discussion demonstrates, unbounded official discretion to regulate indecent material in news and public affairs programming is in and of itself a dangerous threat to journalists' ability to report on crucial issues of significant public interest. When such a restraint is compounded by excessive fines, however, it effectively puts the press and others who seek to gather and disseminate important information out of the business of speaking entirely. But imposition of the large fines, particularly where they are based on isolated and inadvertent utterances, may very well violate this Court's mandate that punitive sanctions be proportional to the harm caused by the underlying violation and in line with the amount of penalties for comparable conduct to withstand constitutional

scrutiny.

A. Fines for indecency violations could put some broadcasters out of business.

In April 2004, the FCC altered its method of calculating fines for indecency violations. Richard E. Wiley et al., *Communications Law 2004: Contentious Times in a Shifting Landscape*, 811 PLI/Pat 109, 168 (2004). Previously, the commission had interpreted the maximum fines in the statute as applying on a per-program basis. *Id.* Under the new policy, however, the commission adopted a per-licensee standard, treating each licensee's broadcast of the same program as a separate violation. *Id.* That is, the maximum fine the FCC could order for each instance was multiplied by the number of affiliates that aired the material, exposing networks to fines in the tens of millions of dollars for the utterance of a single expletive.[7] Moreover, in June 2006, Congress approved the Broadcast Decency Enforcement Act of 2005, which increased the maximum fine the FCC can impose by a factor of 10 – from $32,500 to $325,000. Pub. L. No. 109-235, 120 Stat. 491 (amending 47 U.S.C. § 503(b)(2)). The amendment also caps fines at $3 million per indecent incident per day. *Id.*

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[7] In its first application of the new policy, the FCC calculated apparent liability for a single complaint against a single station against the station's owner as follows: $27,500 (maximum permissible fine) x 3 (number of indecent utterances during the show) x 6 (number of stations that aired the material) = $495,000. Richard E. Wiley et al., *Communications Law 2004: Contentious Times in a Shifting Landscape*, 811 PLI/Pat 109, 168–69 (2004).

It is difficult to quantify the monetary effects of such exorbitant fines. But in many small markets nationwide, where the penalties actually exceed the stations' worth, bankruptcy is a legitimate possibility. Jim Puzzanghera, *Lawmaker Sees both Sides of Broadcast Legislation*, L.A. Times, July 5, 2006, at 1, *available at* 2006 WLNR 11556234;[8] *see also* Talk of the Nation: Obscenity over the Airwaves and Whether Congress or the FCC Should Tighten Restrictions and Regulations (National Public Radio broadcast Jan. 28, 2004), *available at* 2004 WLNR 21542514 (expressing a Portland, Oregon, resident's concern that "10 fines would take [a small community subscription alternative radio station] off the air completely"). As one Washington, D.C., attorney who represents broadcasters put it, "Half a million [dollars] times however many utterances, that amounts to enterprise-threatening fines." Deborah Potter, *Indecent Oversight*, Am. Journalism Rev., Aug.–Sept. 2004, at 80, 80, *available at* 2004 WLNR 22311518 (quoting attorney Kathleen Kirby).

B. Such harsh penalties are disproportionate to the severity of the indecency violations and fines imposed for comparable misconduct.

The Eighth Amendment to the U.S. Constitution prohibits the imposition of excessive fines. U.S. Const. amend. VIII. Although this Court has never addressed the constitutional prohibition on excessive fines in the context of broadcast indecen-

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[8] To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided when possible.

cy fines, its jurisprudence in other Eighth Amendment contexts suggests the indecency enforcement regime lacks the requisite proportionality to pass constitutional muster. This Court's statements about punitive damages in the civil procedure context further support this assertion, not only under a proportionality analysis but also through a comparison of the fines imposed for comparable misconduct.

The excessive fines prohibition was designed "to prevent *the government* from abusing its power to punish." *Austin v. United States*, 509 U.S. 602, 607 (1993). Whether a punitive fine is excessive is determined solely by a proportionality analysis, or a finding of whether the penalty bears some relationship to the seriousness of the violation it is designed to punish. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). A punitive fine violates the Excessive Fines Clause, the Court held, "if it is grossly disproportional to the gravity of [the] offense." *Id.* A "grossly disproportional" determination must be made on a case-by-case basis, considering the amount of the fine compared to the seriousness of and harm caused by the violation. *Id.* at 336–39.

Under this standard, a fine in the thousands, let alone millions, for a fleeting expletive uttered during a news program seems highly disproportionate, as the puppetry incident, discussed *supra*, strongly indicates. In that case, the FCC fined a station $27,500, the statutory maximum, for a depiction that lasted less than one second. *Young Broad.*, 19 F.C.C.R. at 1751, 1755. To be sure, the broadcast did not dwell on or repeat at length the indecent material, thereby minimizing the gravity of the violation. *See In re Industry Guidance on the*

Comm'n's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999, 8003 (2001) (stating that the repetitive nature of the material is relevant to a finding of patent offensiveness). Moreover, because the show's hosts repeatedly warned viewers about the nature of the interview segment beforehand, parents concerned about their children's exposure to the material likely turned off the program. As such, the harm to children — the violation the indecency policy is designed to punish — was likely minimal. Finally, because the policy's aim is to punish broadcasters through both punitive and deterrent means, it seems logical that a proportionate fine would have taken the station's history of indecency violations into account. However, the notice of apparent liability does not indicate that this information was considered when deciding the amount of the fine. *See generally Young Broad.*, 19 F.C.C.R. 1751.

Such a proportionality analysis is also required when evaluating punitive damages in the civil context, the gross excessiveness of which "enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 568, 575 (1996). Under this rule, a comparison of the punitive damages award and the penalties for comparable misconduct must also inform the determination. *Id.* at 583. Under this factor, fines for the overwhelming majority of news and public affairs broadcasts are clearly excessive because many similar programs are not subject to such indecency penalties. Using the puppetry example again, a broadcast of nearly the same footage — the momentary exposure of a penis during a morning news show — was exempt from an indecency fine. *Omnibus Order*, 21 F.C.C.R. at 2717; *see also Letter*

to Mr. Peter Branton, 6 F.C.C.R. 610, 610 (1991) (affirming that airing a National Public Radio news story featuring an expletive-laden surveillance tape of mobster John Gotti did not violate the FCC's indecency rules because the segment was an integral part of a bona fide news story about organized crime and used in a widely reported trial); Allison Romano, *Reporting Live. Very Carefully.*, Broadcasting & Cable, July 3, 2005, at 8, *available at* 2005 WLNR 10574802 (noting that the FCC did not take any action against a Los Angeles television station that aired a post-game interview with Shaquille O'Neal in which the former Lakers star cursed twice).

Finally, the degree of reprehensibility of the punished conduct is the most important indicium of the reasonableness of a punitive damages award. *BMW*, 517 U.S. at 575. Exemplary damages "should reflect the enormity of [the] offense" and "the accepted view that some wrongs are more blameworthy than others." *Id.* (internal citation and quotation marks omitted). In most cases, the airing of indecent material during news or public affairs programming is not an intentionally malicious or flagrant violation that would deem the conduct particularly reprehensible. As the puppetry footage represents, many of these incidents occur accidentally, without the broadcaster's prior knowledge, during live programming. *Young Broad.*, 19 F.C.C.R. at 1752. Subsequent apologies to viewers and disciplinary action against the responsible personnel further demonstrate a lack of willful intent. *See id.* at 1752–53; *see also Sports Talk*, Atlanta J. & Const., Sept. 14, 2011, at C1, *available at* 2011 WLNR 18179904 (reporting that "Monday Night Football" analyst Ron Jaworski

apologized on-air after inadvertently cursing during his commentary).

Indecency fines so large they potentially force broadcasters out of business raise serious constitutional concerns about the permissibility of the penalties. This is particularly the case where the penalty, seemingly unique despite numerous occurrences of comparable conduct, is imposed for the isolated and inadvertent utterance of an expletive during a live news broadcast. Arbitrariness in penalties that violate the constitutional right to receive fair notice of the conduct that will subject a person to punishment and the potential severity of the penalty is no more dangerous than it is in fines that threaten entirely one's fundamental right to speak about important public matters.

III. The Court should take this opportunity to find that broadcasters, much like most other mass media, are able to regulate themselves such that content control by the government is unnecessary.

The foregoing discussion highlights the constitutional challenges that arise from government regulation of content protected by the First Amendment. But this Court recently lent some support to the notion that self-regulation may adequately protect the legitimate interests that prompted government regulation in the first place. *See generally Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011). In finding California's ban on the sale or rental of violent video games to minors unconstitutional, the *Brown* Court noted that a state possesses the legitimate power to protect children from harm. *Id.* at 2736. Its interest in doing so,

however, is significantly reduced when an industry's voluntary, self-regulation system is fairly successful in its own attempts to ensure satisfaction of a state's legitimate interests. *Id.* at 2740–41. Because the video game industry "does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home," filling the remaining modest gap in concerned parents' control "can hardly be a compelling state interest." *Id.* at 2741. Moreover, effective self-policing in other largely unregulated media contexts indicates that leaving content regulation in the hands of the media does not produce a system whereby vulgar profanities are wildly hurled at children. In fact, self-regulation efforts already undertaken by broadcasters provide strong evidence that a decision to forgo strict broadcast regulation need not come at the expense of shielding children from indecent programming.

A. Despite an absence of government regulation, the print media closely monitor themselves to ensure that indecent material, save for those exceedingly rare situations where the public cannot be fully informed about an important issue without its use, is precluded from publication.

The stronger protection this Court has afforded the print media guarantees they are free from government meddling with editorial affairs and restricted in content matters "by only two factors: first, the acceptance of a sufficient number of

readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers." *Tornillo*, 418 U.S. at 255 (internal citation and quotation marks omitted). Despite this lack of official regulation, however, the nation's leading newspapers take great efforts to avoid publication of profanities and otherwise indecent material.

The editorial policies are informed by several factors, including concerns about meeting audience expectations of community standards and preserving the publication's reputation. *See* Allan M. Siegal, New York Times Manual of Style and Usage 241 (1999) ("The Times virtually never prints obscene words, and it maintains a steep threshold for vulgar ones. In part the concern is for the newspaper's welcome in classrooms and on breakfast tables in diverse communities nationwide. But a larger concern is for the newspaper's character. The Times differentiates itself by taking a stand for civility in public discourse[.]"); Washington Post Deskbook on Style 6 (1989) ("The Washington Post as a newspaper respects taste and decency . . . We shall avoid profanities and obscenities unless their use is so essential to a story of significance that its meaning is lost without them. In no case shall obscenities be used without the approval of the executive editor or the managing editor or his deputy."); Notably, these standards are consistently observed despite public criticism that they do not accurately reflect modern culture's constantly changing concepts of taste and decency. Melissa McCoy et al., Los Angeles Times Stylebook 156–57 (Supp. 2008) ("We acknowledge that a wide range of vulgarities are commonplace on the Internet and elsewhere, but we intend to maintain a much higher standard.

We may describe and report on people whose speech is obscene, profane, crude or crass, but we should avoid doing so at their level."); Clark Hoyt, *When to Quote Those Potty Mouths*, N.Y. Times, July 13, 2008, at 12, *available at* 2008 WLNR 13107977 (defending the newspaper's decision to exclude from its coverage of the death of George Carlin the seven words he famously concluded one "can never say on television" and its decision to decline to publish inadvertently recorded comments Jesse Jackson made about then-Senator Barack Obama, a move that led one reader to wonder if The Times is edited by "prudish kindergarten teachers. It is not good when a NY Times reader is forced to wonder what actually the fuss is about and then must start looking at other newspapers to find out.").

Conceivably, the rationales underlying this self-regulation are even more compelling in the broadcasting context. While newspaper readers in most communities nationwide are limited to only one source of that information, television viewers often have the ability to receive similar reports from several sources, allowing them to protest the airing of material they find objectionable by just a quick flick to the remote control. The strong need to protect advertising revenue in this competitive market exerts a very strong pressure on broadcasters to self-regulate their indecent programming. Maria Matasar-Padilla, Note, *Music Lessons: What Adam Lambert Can Teach Us About Media Self-Regulation*, 29 Cardozo Arts & Ent. L.J. 113, 115 (2011). As such, audience regulation via channel changing is potentially just as effective as government regulation in ensuring that broadcast content conforms to community standards. *Id.* at 140–42.

B. Not immune from internal and external market pressures, cable broadcasters regulate indecency in their programming.

While newspapers are resolutely committed to preserving their reputations as tasteful and decent content providers notwithstanding the lack of government regulations requiring them to be so, cable television has gained a reputation as the racy, risqué and at times downright sleazy alternative to broadcast's less steamy programming. Yet, a fairly comprehensive content analysis indicates that the medium's use of offensive language may compare to that of its family-friendly counterpart more closely than its reputation suggests. *See* Barbara K. Kaye & Barry S. Sapolsky, *Taboo or Not Taboo? That Is the Question: Offensive Language on Prime-Time Broadcast and Cable Programming*, J. Broadcasting & Electronic Media, Mar. 2009, at 1. To be sure, *amici* recognize that accusations that cable programs contain more verbal indecencies than broadcast programs are not unfounded. *Id.* at 12. Indeed, primetime cable programs that aired over seven nights in fall 2005 included just over 1.5 times more offensive words[9] than broadcast programs that aired at the same time. *Id.* at 6, 12. Other find-

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[9] Offensive words were defined as sexual, excretory and the seven words in George Carlin's monologue, as well as other "crudities" such as "damn," "slut" and "bitch." Barbara K. Kaye & Barry S. Sapolsky, *Taboo or Not Taboo? That Is the Question: Offensive Language on Prime-Time Broadcast and Cable Programming*, J. Broadcasting & Electronic Media, Mar. 2009, at 1, 7.

ings of the study, however, provide a useful context to a discussion of the medium's apparent efforts to regulate its indecent programming.

Overall, nine out of 10 programs on both broadcast and cable television contained at least one indecent word or phrase, some of which were bleeped, and risqué language was spoken nearly once every five minutes in both contexts. *Id.* at 11. Moreover, cable viewers are by no means confronted by the likes of George Carlin's veritable string of expletives every time they tune in. In fact, cable programs bleep or obscure slightly more than 25 percent of all offensive words. *Id.* at 12. In addition, although viewers of broadcast programs were exposed to slightly less than 10 objectionable words per hour compared to 15 words per hour on cable programs, a more careful examination of the data reveals that cable networks may not be equally to blame for the disparate inclusion of indecent material. *Id.* at 1, 13. For example, when certain programming was excluded from the calculation, the percent of indecent words that aired during the relevant time period during cable, as opposed to broadcast, programs decreased from 61.1 percent to 52.4 percent. *Id.* Thus, while cable programs still contain more vulgarities than broadcast programs, the discrepancy is significantly less, with the frequency of utterances nearly equal between the two media, once particular programming is excluded. *Id.*

Notably, however, even these worst offenders are not so irreverent as to be ignorant of the strong need to regulate their indecent programming in light of considerations ranging from desires to satisfy large corporate owners and executives to concerns about challenging viewers' expectations to

the extent they are unwilling to watch any further, thereby threatening advertising revenue. *See* Jim Rutenberg, *'South Park' Takes Gross to New Frontier*, N.Y. Times, June 25, 2001, at C9, *available at* 2001 WLNR 3390516 (recounting the "long and hard" thought process Bill Hilary, executive vice president of Comedy Central, then jointly owned by media giants Time Warner Entertainment and Viacom, underwent before excepting from the company's general policy against uncensored cursing a "South Park" episode that included 162 uncensored utterances of "shit" in an attempt by the sometimes-vulgar series starring foul-mouthed cartoon children to question why certain words are taboo). Thus, far from embracing an anything-goes policy of indecent programming, the overwhelming majority of cable broadcasters, sensitive to internal and external market pressures, regulate themselves in a manner that produces indecency findings on par with those of government-regulated broadcasters, without the threat of onerous fines that turn accidental utterances into restraints on the ability to speak out on important matters.

C. Effective self-regulatory measures already in place in the broadcast industry indicate the mass medium, much like its print and cable counterparts, is capable of regulating itself in a manner that obviates the need for government oversight.

Fortunately, the Court does not have to speculate about broadcasters' self-regulatory efforts should it find the media are capable of policing themselves and thus should not be subject to gov-

ernment regulation. Indeed, broadcasters have provided insight into their standards for judging "what constitutes material suitable for broadcast" and demonstrate attempts to consistently act in accordance with those policies.[10] CBS/Broad. Group, Program Standards for the CBS Television Network, *in* Television As a Social Issue 132, 132 (Stuart Oskamp ed., 1988).

In one of the few copies of networks' Standards and Practices publicly available,[11] CBS declares its television programming "a guest in the home . . . intended to conform to generally accepted boundaries of public taste and decorum, ..." *Id.* at 133. As such, language in a broadcast must be "generally considered to be acceptable by a mass audience. Coarse or potentially offensive language is generally avoided and, if permitted for important dramatic reasons, cannot be employed flippantly or

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[10] The government cites the fact that the broadcast networks' own internal standards generally prohibit airing the language at issue in this case and that Fox edited it out of later broadcasts to argue that the networks' own recognition of the indecency of the material strongly supports the permissibility of the FCC's action. Pet'r's Br. 18, 28. Simply put, however, that is not the point. The fact that responsible broadcasters monitor themselves to ensure compliance with the policy does not change its inherently subjective nature and chilling effect on protected speech. Put another way, the fact that most people opt to not burn American flags and thus would not be subject to a statute criminalizing the protected activity does not mean the law is somehow constitutional.

[11] Most broadcasters consider their Standards & Practices, their internal guidelines for controlling broadcast content, to be proprietary materials that are applied in a highly secretive manner. Maria Matasar-Padilla, Note, *Music Lessons: What Adam Lambert Can Teach Us About Media Self-Regulation*, 29 Cardozo Arts & Ent. L.J. 113, 115–16 & n.16 (2011).

exploitatively." *Id.* at 134. Likewise, scenes or dialogue involving sexually oriented material must be necessary for plot or character development, presented with "good taste and sensitivity" and not "gratuitous or exploitative." *Id.* Moreover, certain degrees of nudity are acceptable if "consonant with prevailing societal standards, used for legitimate dramatic or historical purposes, and not perceived as exploiting the body for prurient interests." *Id.* Additionally, as the lower court noted, rather than trying to test the limit on what material is permitted, the networks have expressed a "good faith desire to comply with the FCC's indecency regime." *Fox*, 613 F.3d at 331.

A relatively recent incident demonstrates the application of these standards and provides strong evidence of broadcasters' ability to effectively regulate themselves in accordance with their guidelines. During a live evening broadcast of the November 2009 American Music Awards on ABC, Adam Lambert, runner-up in the 2009 season of the popular singing talent competition "American Idol," performed a sado-masochism themed act in which he moved about the stage alternately kissing a male band member, leading a dancer on a leash, fondling another dancer and shoving one male dancer's head into his crotch. Matasar-Padilla, *supra*, at 113–14. Lambert, who had openly acknowledged his homosexuality since "American Idol" aired, ended the performance by glaring into the camera and raising his middle finger. *Id.* Concerned that its audience would find the content troubling or offensive, ABC made an on-the-spot decision to cut away from its camera coverage of Lambert to an aerial shot of the audience when the performer unexpectedly simulated oral sex with a male dancer. *Id.* at 128. The

network also decided to edit the simulated sex act from the West Coast rebroadcast while leaving other sexually charged aspects of the performance intact. *Id.* Citing 1,500 complaints filed against the performance, ABC announced the following day it had canceled Lambert's upcoming appearance on the news program "Good Morning America." *Id.* at 129. The network also canceled his scheduled appearance on the late-night interview program "Jimmy Kimmel Live." *Id.* at 131. Moreover, ABC announced a new policy for vetting live performances, establishing a system by which negative financial repercussions would be created for performers who engaged in unexpectedly indecent or obscene behavior during a live broadcast. *Id.* at 136. Additionally, other broadcasters engaged in self-regulation in their coverage of the event. CBS, for example, blurred a still photograph of Lambert kissing a male band member. *Id.* at 131–32.

Effective self-policing of indecent programming across various spectrums of the mass media indicates that a lack of strict government regulation does not necessarily produce a wild, freewheeling broadcast system whereby children are exposed to profanities at every utterance. Rather, broadcasters are fully capable of policing themselves in a manner that serves the FCC's legitimate interest in protecting children while avoiding the constitutional threats that arise from government regulation of content.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below and take this opportunity to clarify that the indecency policy's news exemption, rather than saving the enforcement scheme from unconstitutionality, suffers from its same standardless manner of enforcement. The FCC assures news and public affairs broadcasters that it takes a hands-off approach to regulation of programming about matters of public interest and concern. Yet, the government conspicuously reaches its hand into the editing rooms of this nation's broadcasters each time it replaces their journalistic discretion with its own subjective belief about the quality of a program. And the effect of this interference with the internal affairs of broadcasters is a severe restraint on the ability to effectively report on vital issues of significant public interest that leaves viewers and listeners less than fully informed.

A strict and constitutionally suspect enforcement scheme is not the only means to serve the government's legitimate interest in shielding children from indecent programming. The print media and cable broadcasters have created an indecency regime whereby the protection of children does not come at the expense of First Amendment protections necessary to preserve "the free and robust debate of public issues" and foster "a meaningful dialogue of ideas." *Snyder*, 131 S. Ct. at 1211 (internal citation and quotation marks omitted). The long-standing policy of self-regulation in the broadcasting context indicates that the medium is no less capable than its counterparts of monitoring its own indecent programming in a manner that

ensures that broadcast content conforms to community standards.

As currently enforced, the FCC's indecency policy generally and news exemption specifically belie government assertions of its recognition that matters presented in news and public affairs programming are the very type of speech entitled to special protection. On the contrary, the commission exercises its authority to regulate indecency in news broadcasts with the same level of arbitrariness it applies to other kinds of programming — a restraint on the publication of matters at the core of the First Amendment's protections that this country cannot tolerate. As such, a finding that the enforcement scheme, at least as applied to news and public affairs programming, infringes the First Amendment's guarantee of a free press is required by the Court.

Respectfully submitted,

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
Kristen Rasmussen
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209-2100
ldalglish@rcfp.org
(703) 807-2100

November 10, 2011

APPENDIX A

Descriptions of *amici curiae*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee is an unincorporated association of reporters and editors with no parent corporation and no stock.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington-based Scripps Media Center, home of the Scripps Howard News Service. Scripps has agreed to a stock purchase of four ABC affiliates and five Spanish language stations from McGraw Hill Companies, Inc., pending FCC approval. Scripps is a publicly traded company with no parent company. No individual stockholder owns more than 10 percent of its stock.

APPENDIX B

Additional counsel:

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

AMICUS CURIAE BRIEF

No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Petitioners,

—v.—

FOX TELEVISION STATIONS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE STUDENT PRESS LAW CENTER AND COLLEGE BROADCASTERS, INC., IN SUPPORT OF RESPONDENTS

FRANK D. LOMONTE
STUDENT PRESS LAW CENTER
1101 Wilson Boulevard
Suite 1100
Arlington VA 22209-2275
(703) 807-1904
director@splc.org

GREGORY STUART SMITH
COUNSEL OF RECORD
LAW OFFICES OF
GREGORY S. SMITH
1627 I (Eye) Street, NW
Washington, DC 20006
(202) 460-3381
gregsmithlaw@verizon.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

STATEMENT OF INTEREST.....1

SUMMARY OF THE ARGUMENT.....1

ARGUMENT.....4

I. The FCC's Indecency Regime Is Substantially Overbroad.....4

A. The FCC's Indecency Regime Has Expanded Greatly Since *Pacifica*.....4

B. The FCC's Current Indecency Regime Violates the First Amendment Because It Regulates News, Artistic, and Other Programming That Does Not Harm Children or Invade a Listener's Privacy.....9

II. The FCC's Indecency Regime Is Void For Vagueness 16

A. This Court Should Consider The Fifth Amendment Interests of Broadcasters Not Party To This Case Regardless of Whether Respondents' Speech Was Clearly Proscribed.....16

B. The FCC's Indecency Regime Violates the Fifth Amendment Because it Permits Arbitrary Enforcement Practices 20

III. The FCC's Indecency Regulation Has A Disparate and Demonstrated Chilling Effect On Student Broadcasters.....28

A. Student Broadcasters Serve a Unique Role in Informing Their Community.....28

B. The FCC's Indecency Regime Has Made it Difficult for Student Broadcasters to Serve Their Community Adequately.....29

C. The FCC's Vague Indecency Regime Has Chilled Speech and Forced Student Broadcasters To Engage In Demonstrated Self-Censorship.....36

CONCLUSION.....40

TABLE OF AUTHORITIES

Supreme Court Precedent:

Baggett v. Bullitt, 377 U.S. 360 (1964).....36

Branzberg v. Hayes, 408 U.S. 665 (1972) 13, 24

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 9, 10

Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729 (2010) 11, 17

Butler v. Michigan, 352 U.S. 380, 383 (1957).....12

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Coates v. City of Cincinnati, 402 U.S. 611 (1971).....18

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Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) 9

Gentile v. State Bar, 501 U.S. 1030 (1991).....17

Grayned v. City of Rockford, 408 U.S. 104 (1972)..17

Harper & Row v. Nation Enter., 471 U.S. 539 (1985).....30, 31

Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) 18, 19

Kolender v. Lawson, 461 U.S. 352 (1983) 18

Reno v. ACLU, 521 U.S. 844 (1997) 33

Sable Comm. Of Cal. v. FCC, 492 U.S. 115 (1989).33

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000) 33, 34

United States v. Stevens, 130 S. Ct. 1577 (2010) 10, 15

United States v. Williams, 553 U.S. 285 (2008).....10, 16

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 18, 19

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).....10

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In re Citicasters Co., 15 F.C.C. Rcd. 19095 (EB 2000) 23

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In re KBOO Found, 16 F.C.C. Rcd. 10731 (EB 2001) 22, 30, 35

In re KBOO Found., 18 F.C.C. Rcd. 2472 (EB 2003) 22, 30, 35

In re State Univ. of N.Y., 13 F.C.C. Rcd. 23810 (1998) 29, 37

In re The Regents of the Univ. of Cal., 2 F.C.C. Rcd. 2703 (1987) 29

In re Tri-State Univ., 24 F.C.C. Rcd. 4961 (MB 2009) 37

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Letter to Merrell Hansen, 6 F.C.C. Rcd. 3689 (MMB 1999) 13

Letter to Peter Branton, 6 F.C.C. Rcd. 610 (EB 2000) 7, 25

The Info. Needs of Communities, FEDERAL COMMUNICATIONS COMMISSION, 2011 WL 2286864 (June 2011) 14, 28 30

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18 U.S.C. § 1464 5

47 C.F.R. § 1.80(b)(1) 24, 37

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Three Six Mafia, *It's Hard Out Here For a Pimp, on* HUSTLE & FLOW SOUNDTRACK (Atlantic Records 2005) 32

Mark Steyn, *The Fifth Nixon*, THE ATLANTIC (April 2005) 12

NORMAN A. P. GOVONI, DICTIONARY OF MARKETING COMMUNICATIONS 63 (2004).....34

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Robert Arcamona, *Dirty Words*, STUDENT PRESS LAW CENTER REPORT, Fall 2008, at 31.....38

Steve Knopper, *College Radio Suffers Growing Pains*, BILLBOARD, July 9, 1994, at 84.....38

The KWUR Bible, oldsu.wustl.edu/file.php?id=545.....38

The WESN DJ Manual, http://www.iwu.edu/~wesn/info/djmanual.htm.....39

Wiz Khalifa, *Black and Yellow* (Rostrum Records 2011) 32

STATEMENT OF INTEREST

Amici Curiae are the College Broadcasters, Inc. (CBI) and the Student Press Law Center (SPLC).[1] The CBI is an association representing students involved in student operated radio, television, webcasting and other media-related ventures. The CBI is committed to education and students' pursuit of excellence through active involvement in electronic media, promotes cooperative efforts with other national, regional, and state media organizations, and facilitates the discussion of issues related to student-operated electronic media. The SPLC is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting the rights of student journalists. The SPLC serves as a repository of legal research about the issues impacting the ability of students to gather and distribute information across all mediums. The SPLC frequently appears as a friend-of-the-court to speak for the student media in cases that implicate students' ability to publish or broadcast freely.

SUMMARY OF ARGUMENT

The wide-ranging, randomly enforced indecency regime employed today bears little

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. This *amicus* brief is filed pursuant to the consent of all parties of record.

resemblance to the narrow scheme of content-based regulation upheld as constitutional in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Federal Communications Commission's (hereinafter "FCC" or "Commission") current approach to indecency enforcement – to the extent that any coherent approach can be discerned – has become unmoored from its foundational justification of protecting vulnerable ears from the "repetitive, deliberate use" of "patently offensive" language delivered over a uniquely accessible medium. The Second Circuit accurately recognized that the Commission's "indiscernible" standards invite viewpoint-based discrimination and properly struck them down as unconstitutionally vague.

The Commission's re-characterization of "indecency" as including stray, isolated profanities has no room to navigate between the Scylla of overbreadth and the Charybdis of vagueness. A *per se* rule proscribing all uses of sexual or excretory invective undeniably would penalize speech of overriding journalistic or artistic import. However, lacking clear guidance (or a consistent record of enforcement activity) to the contrary, broadcasters today must conduct themselves as if this *is* the standard to which they will be held. Recognizing the fatal overbreadth of such a standard, the Commission claims that it can be trusted to make case-by-case enforcement decisions, applying a less-than-categorical exemption for programs of serious artistic or journalistic value. In effect, the Commission is telling the Court, "Our regulations can't be unconstitutionally overbroad – just look how vague they are."

An ambiguous regulatory regime adversely affects all broadcasters, but it uniquely impacts student broadcasters, for several reasons. First, student broadcasting operations often lack the financial capacity to pre-screen all programming for stray curse-words, or to absorb five- and six-figure fines for momentary lapses. Second, student-run stations represent a training ground for future broadcast professionals, and a "zero tolerance for mistakes" regime simply is unrealistic in an educational setting. Finally, campus stations exist to serve a primary listening audience whose tastes exist at the outer edges of the "community standards" the Commission purports to enforce, including ethnic and minority listeners whose needs often go unmet by mainstream commercial broadcasters. Campus broadcasting cannot function as a laboratory for experimentation – experimentation that is essential unless "community standards" are to remain frozen in 1978, never to evolve – if it must conform to ill-defined notions of indecency that inadequately protect *bona fide* artistic and journalistic expression. The Commission's current approach chills college broadcasters into self-censoring their speech so as to leave a broad buffer before reaching the indistinct boundary where indecency may (or may not) lie. This is the hallmark of an unconstitutionally vague regulatory regime.

ARGUMENT

I. The FCC's Indecency Regime Is Substantially Overbroad

The FCC's indecency framework is substantially overbroad. The Commission's current indecency regime is far more expansive than anything considered by the Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and now regulates speech that the FCC did not restrict thirty years ago.

A regulation violates the First Amendment if it "sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The Commission's current indecency regime casts a shadow over news, artistic programming, and other speech that the government has no important or compelling interest in regulating. As a result, the FCC's current policy violates the First Amendment.

A. The FCC's Indecency Regime Has Expanded Greatly Since Pacifica

As the Second Circuit detailed, the FCC has steadily broadened what it considers indecent programming since *Pacifica*. *See Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 319-324 (2d Cir. 2010). In *Pacifica*, a plurality of the Court upheld the Commission's indecency rules as applied to a monologue by comedian George Carlin. *Pacifica*, 438 U.S. at 744. The plurality upheld the ban on

indecent broadcasting as applied to the Carlin monologue because the government had an interest in protecting children from uniquely accessible harmful depictions, *id.* at 749-50, and in protecting individuals' private spheres from a "uniquely pervasive" form of communication, *id.* at 748-749. It follows that any content-based regulation of indecent speech in broadcasting must further these rationales.

The Commission currently defines actionably "indecent" programming, *see* 18 U.S.C. § 1464 (2010), as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience," *see In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 98 ¶ 11 (1975). To determine whether a program is actionably indecent, the Commission embarks on a conjunctive two-part test.

First, the Commission will determine whether a program depicts sexual or excretory organs and activities. *In re Indus. Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C. Rcd. 7999, 8002 ¶ 7 (2001) (hereinafter "*Industry Guidance*"); *see In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C. Rcd. 4975, 4978 ¶ 8 (2004) (hereinafter "*Golden Globes Order*") (Commission will also regulate terms and depictions not intended to refer to proscribed organs or

functions if the term is deemed "inherently" sexual). Second, the FCC will determine whether a program is "patently offensive as measured by contemporary community standards for the broadcast medium." *Golden Globes Order*, 19 F.C.C. Rcd. at 4977 ¶ 6. The Commission has changed its interpretation of this second inquiry markedly since *Pacifica*. *Compare In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 ¶ 10 (1978) ("[w]e intend strictly to observe the narrowness of the *Pacifica* holding"), *with In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C. Rcd. 2664, 2668 ¶ 13 (2006) (hereinafter "*Omnibus Order*").

In 2001, the Commission stated that a program's "*full context*" is critical when determining whether it is patently offensive. *Industry Guidance*, 16 F.C.C. Rcd. at 8002 ¶ 9. Despite espousing a "full" contextual approach, the FCC often exclusively relies on three "principle factors" to determine patent offensiveness. *See, e.g.*, *Omnibus Order*, 21 F.C.C. Rcd. at 2668 ¶ 13. Those "principle factors" are:

> (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; [and] (3) *whether the material appears to pander or is used to titillate*, or

> *whether the material appears to have been presented for its shock value.*

Industry Guidance, 16 F.C.C. Rcd. at 8003 ¶ 10.

From time to time, the Commission has articulated other contextual considerations when determining whether a program is patently offensive. For instance, the Commission has stated that it will rarely deem *bona fide* news programs to be indecent. *See In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C. Rcd. 13299, 13327 ¶¶ 70-73 (2006) (hereinafter "*Remand Order*"). The Commission's treatment of news programming, however, has been disjointed to say the least.

In its *Remand Order*, the Commission stated that news coverage is not categorically outside of the indecency regime. *Remand Order*, 21 F.C.C. Rcd. at 13327 ¶ 71 ("To be sure, there is no outright news exemption from our indecency rules."). Yet, in its next breath, the Commission excused otherwise indecent content for no reason other than the fact that it was aired as part of a news program. *Id.* at 13327-28 ¶¶ 72-73. In other cases, the Commission has analyzed news programming using its three "principle factors," not categorically. In 2000 the Enforcement Bureau ruled that a news segment broadcasted by National Public Radio (NPR), which aired the word "fuck" (or a derivative thereof) ten times, was not pandering or titillating and therefore not patently offensive. *See Letter to Peter Branton*, 6 F.C.C. Rcd. 610 (EB 2000). Broadcasters will

rarely, if ever, air news programming for the purpose of pandering or titillation. As a result, the Enforcement Bureau's ruling had the potential to provide broadcasters with some reassurance that news programming is safe from enforcement action. The FCC, however, has elsewhere stated that a broadcast need not be pandering or titillating to be punishable as patently offensive, stripping all reassurance. *Industry Guidance*, 16 F.C.C. Rcd. at 8014 ¶ 23 ("The absence of a pandering or titillating nature, however, will not necessarily prevent an indecency determination . . . .").

Additionally, the Commission has stated that a program's artistic nature is a contextual factor worth consideration. In 2005 the FCC refused to fine a licensee for broadcasting indecent terms used in a film because they were integral to the work's artistic message. *See In re Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C. Rcd. 4507, 4512-13 ¶ 14 (2005) (hereinafter "*Saving Private Ryan Order*"). However, the FCC has not protected all films or artistic works similarly. *See Omnibus Order*, 21 F.C.C. Rcd. at 2685 ¶ 77, 2688-89 ¶ 93 (documentary and film's use of explicit terms actionable).

In sum, what started with narrow authority to limit verbal "shock treatment" on the airwaves has metastasized into something far different. The FCC's current expansive indecency regime restricts substantially more speech than it did in 1978, and applies to news and artistic expression although to what extent is a mystery.

B. The FCC's Current Indecency Regime Violates the First Amendment Because It Regulates News, Artistic, and Other Programming That Does Not Harm Children or Invade a Listener's Privacy

The FCC's modern interpretation of what it considers "indecent" programming sanctions speech that in no way harms children or supports the other state interests upheld in *Pacifica*. As a result, it violates the First Amendment as substantially overbroad.

This Court should employ a First Amendment overbreadth analysis to this case. In *Pacifica*, the plurality did not invoke the substantial overbreadth doctrine to analyze the FCC's narrow and limited indecency regime. *Pacifica*, 438 U.S. at 743; *see In re Application of WGBH Educ. Found.*, 69 F.C.C.2d at 1254 ¶ 10 ("We intend strictly to observe the narrowness of the *Pacifica* holding"). Now that the FCC has greatly expanded the scope of its regime, this Court must employ such "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Broadcasters have urged the FCC to restrain itself when taking indecency enforcement actions, *see Remand Order*, 21 F.C.C. Rcd. at 13301-02 ¶¶ 9-10, and have sought non-constitutional grounds to relieve the current regime's stifling effect on speech, *see Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). These efforts have been in vain. Thus, an overbreadth challenge is proper in this case as a "last resort." *Broadrick*, 413 U.S. at 613.

A law is facially overbroad if a substantial number of its applications are unconstitutional, as judged in relation to its plainly legitimate sweep. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008). In order to determine whether a law is overbroad, a court must "construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008) Once that has been accomplished, a court will contrast a law's legitimate sweep against its illegitimate sweep. *See Broadrick*, 413 U.S. at 615-16. If a law, on its face, restricts a substantial amount of speech above that necessary to meet a permissible goal, the regulation violates the First Amendment. *See United States v. Stevens*, 130 S. Ct. 1577 (2010). To determine whether a regulation is overbroad, a court will not limit its review to actual enforcement practices. *See id.* at 1591 ("We would not uphold an unconstitutional statute merely because the government promised to use it responsibly.").

It is difficult to define the scope of the FCC's current indecency regime, which applies to both literal depictions of sexual or excretory organs and functions as well as terms that were not intended to refer to such functions. *See Golden Globes Order*, 19 F.C.C. Rcd. at 4978 ¶ 8. The regime also applies to news programming, artistic films, and musical performances – any and all broadcasting.

The *Pacifica* plurality found that a restrained indecency regime directed at a narrow class of speech was constitutional as applied to the Carlin comedy skit. There, the indecency regulation's legitimate scope was to: (1) protect children from a repeated bombardment of harmful images; and (2)

protect the sanctity of the home and other private spheres from unwanted messages.

The FCC's current indecency regime, on its face, prohibits substantially more speech than is necessary to protect children. The FCC has no legitimate interest in restricting speech that does not harm children even if it is "unsuitable" for them, *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2736 n.3 (2010), or may be offensive, *Pacifica*, 438 U.S. at 745. Even assuming *arguendo* that repetitive verbal shock treatment harms children, *see Pacifica*, 438 U.S. at 749-50 (citing studies that concluded *obscene* material harms children), that is no longer all the Commission's indecency policy prohibits.

For instance, the FCC's current indecency policy now regulates news programming. *See Remand Order*, 21 F.C.C. Rcd. at 13327 ¶ 71 ("To be sure, there is no outright news exemption from our indecency rules."). The FCC does not contend, nor could it, that indecent terms broadcast in a news program harm children to the point that such terms should be proscribed. Indeed, the *Pacifica* plurality noted that if the FCC began regulating discussions of socially important issues, its indecency regime may well not pass constitutional muster. *Pacifica*, 438 U.S. at 733.

Just last term, this Court reaffirmed minors' constitutionally protected right to receive information, even where the government deems the content to be potentially harmful. *Brown*, 131 U.S. at 2736 n.3. And yet, the Commission claims authority to fine (or not to fine, at its unfettered discretion) a broadcaster for airing socially

important information based on a theoretical harm to minors even less well-supported by research than that found inadequate in *Brown*.

If a radio broadcaster wished to air an unedited version of former President Nixon's Oval Office tape recordings so that listeners may make their own determinations as to the President's conduct, the broadcaster could not do so without fear of FCC reprisal. *See* Mark Steyn, *The Fifth Nixon*, THE ATLANTIC (April 2005) (Nixon tapes contained many terms the FCC has elsewhere determined to be indecent). As the Commission has emphasized, no *per se* exception to the indecency regime exists for discussion of matters of public importance, *Remand Order*, 21 F.C.C. Rcd. at 13327 ¶ 71, and the "principle factor[]" that may save a news program from enforcement action (pandering or titillation) "will not necessarily prevent an indecency determination," *Industry Guidance*, 16 F.C.C. Rcd. at 8014 ¶ 23. With the threat of a substantial fine, broadcasters are unlikely to air the unedited program despite its historical value. In effect, the indecency regime does what this Court has expressly forbidden in all contexts outside of over-the-air broadcasting: reduce the level of discussion to terms an administrative agency deems fit for children. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957) (printed material cannot be censored so as to meet a standard of what is deemed fit for a child to read).

The FCC's current policy goes further than simply regulating news programming. The current indecency regime puts the government into the business of picking-and-choosing what programming

constitutes *bona fide* news. Under its current "patently offensive" framework, the FCC will selectively, using unpublished standards, bestow the classification of "news" on some broadcasts, *see Remand Order*, 21 F.C.C. Rcd. at 13327-28 ¶ 72, but not others, *see Letter to Merrell Hansen*, 6 F.C.C. Rcd. 3689 (MMB 1999) (programming describing an issue "in the news" was not considered a news program and ruled to be patently offensive). Allowing government to judge the legitimacy of journalistic activity is an exercise fraught with peril. *See Branzberg v. Hayes*, 408 U.S. 665, 703-04 (1972).

Additionally, the indecency regime now regulates artistic programming even though such programming is unlikely to harm children. *See Omnibus Order*, 21 F.C.C. Rcd. at 2683-845 ¶¶ 72-78, 2688-89 ¶ 93. Again, the *Pacifica* plurality warned that satire and other artistic expressions may be outside of the FCC's lawful reach. *Pacifica*, 438 U.S. at 746, 750. The FCC's current contextual "patently offensive" standard allows the Commission to determine for itself which expressions are integral to an artistic message, *see Saving Private Ryan Order*, 20 F.C.C. Rcd. at 4512-13 ¶ 14, and which are not, *see Omnibus Order*, 21 F.C.C. Rcd. at 2683-85, ¶¶ 72-78. The Commission may not appoint itself the arbiter of which lyrics are too vulgar to qualify as "art" for indecency purposes. *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("one man's vulgarity is another man's lyric").

The FCC's current indecency regulation also restricts far more speech than necessary to protect individuals' right to privacy against a uniquely

pervasive medium. Broadcasting no longer has a "uniquely pervasive presence" in this country. *Pacifica*, 438 U.S. at 748. Since *Pacifica*, other technologies that similarly place information into a listener's private sphere, such as cable and satellite systems, have become as ubiquitous as broadcasting. There were roughly 9.8 million cable subscribers in the mid 1970s, compared to the 66.25 million cable subscribers in 2000 and the 62 million tallied in 2009. *The Info. Needs of Communities*, FEDERAL COMMUNICATIONS COMMISSION, 2011 WL 2286864 at *117 (June 2011). Direct broadcast satellite (DBS) television service was not generally available to consumers in the United States until 1994. Richard A. Gershon, TELECOMMUNICATIONS AND BUSINESS STRATEGY 118 (2009). As of 2010, however, the two largest DBS providers, DirecTV and DISH Network, had roughly 33.5 million subscribers. *The Info. Needs of Communities*, FEDERAL COMMUNICATIONS COMMISSION, 2011 WL 2286864 at *119 (June 2011). In total, subscription-based television, which includes cable and satellite television services, now makes up roughly 90 percent of household television service. *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, 546 ¶ 8 (2009).

Moreover, the current indecency regime restricts far more speech than necessary to protect individuals' privacy. The FCC does not require an individual filling an indecency complaint to have

viewed or heard the allegedly indecent program.[2] Even if no listener reported being surprised by indecent language while listening at home or in a car, the Commission could still issue a forfeiture order. This practice extends the current indecency regime far beyond the state interest of protecting listeners' privacy.

Thus, the FCC's current indecency standard is substantially overbroad. The current regime allows a government agency to define and regulate "news" and "artistic" programming without any claim that such programming harms children. Moreover, the current regime regulates programming regardless of whether it intrudes on a listener's private sphere. As a result, the Commission's indecency regime violates the First Amendment.

The Commission claims that its contextual "patently offensive" standard limits its indecency authority only to those depictions that harm children or protects individuals' privacy in ways similar to that upheld in *Pacifica*. Even if that contextual standard saves the FCC's indecency regime from being substantially overbroad – and it does not, *see Stevens*, 131 U.S. at 1591 (enforcement decisions do not alleviate overbreadth concerns) – it renders the regime unconstitutionally vague.

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[2] The FCC's instructions on filing an indecency complaint are available at http://transition.fcc.gov/eb/oip/Compl.html.

II. The FCC's Indecency Regime Is Void For Vagueness

The Commission's indecency regulation, as it is currently understood, violates the Due Process Clause of the Fifth Amendment. The FCC's regime also is unconstitutionally vague, in part, because it allows for irreconcilable, arbitrary, and erratic enforcement against all broadcasters.

A. This Court Should Consider The Fifth Amendment Interests of Broadcasters Not Party To This Case Regardless of Whether Respondents' Speech Was Clearly Proscribed

This Court may consider whether the FCC's indecency regime violates the Fifth Amendment, regardless of whether Respondents' speech was clearly proscribed, because the regime: (1) is subject to a facial challenge; (2) directly restricts a constitutionally-protected right; and (3) presents a threat of arbitrary enforcement. When these three conditions are present this Court's precedent allows a party to challenge a regulation regardless of whether a party's own conduct was clearly proscribed.[3]

The Due Process Clause may render a law unconstitutionally void for vagueness for one of two independent reasons. *See Williams*, 553 U.S. at 304; *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). First, a court may invalidate a law on vagueness

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[3] *Amici* do not contend that the Respondents' speech was clearly proscribed – it was not.

grounds when it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Second, the Constitution will invalidate a law if it authorizes or encourages arbitrary or discriminatory enforcement, *Morales*, 527 U.S. at 56, or the threat thereof, *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991). The Fifth and Fourteenth Amendments' prohibition on vague laws applies to all regulations, even those that "regulate expression for the purpose of protecting children." *Brown*, 131 S. Ct. at 2743 (internal citations omitted).

In *Morales*, this Court voided on facial vagueness grounds, 527 U.S. at 55, a Chicago ordinance that prohibited "criminal street gang members" from "loitering" with one another, *id.* at 45-46. The Court noted that loitering was a constitutionally protected "liberty." *Id.* at 53. Although the ordinance may have clearly proscribed the actions of some respondents joined in the *Morales* consolidated appeal, *id.* at 82-83 (Scalia, J., dissenting), the Court invalidated the ordinance because, in part, it did not "provide sufficiently specific limits on the enforcement discretion of the police," *id.* at 64. In striking the regulation, this Court's opinion continually considered how the regulation affected the average Chicago citizen. *Id.* at 61-63. Thus, in a (1) facial vagueness challenge; (2) to a regulation that directly restricted a constitutionally protected right; (3) as arguably allowing for arbitrary enforcement, the Court has considered the application of the regulation to third parties regardless of whether the speaker's actions

were clearly proscribed.

Similarly, in *Coates v. City of Cincinnati*, this Court invalidated an ordinance on its face because a violation to the law "may entirely depend upon whether or not a policeman is annoyed." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). The Cincinnati ordinance at issue in *Coates* directly restricted the constitutionally protected right of assembly. *Id.* at 614. The Court in *Coates* acknowledged that the record did not reveal what actions subjected the petitioner to liability. *Id.* Nonetheless, the Court found the Cincinnati statute to be unconstitutionally vague. Thus, *Coates* demonstrates that this Court will entertain a vagueness challenge regardless of whether the ordinance at issue clearly applied to the parties before the Court when a regulation directly impairs a constitutionally protected right and is challenged on the grounds that it grants government officials unbridled discretion. *See also Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983).

As the above-mentioned cases demonstrate, the FCC errs in claiming that this Court may not consider the indecency regime's effect on broadcasters not party to this case. To support its argument the FCC incorrectly cites *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) and *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718-19 (2010) (hereinafter "*HLP*"). Neither, however, is on point to this case.

In *Hoffman Estates*, a village required businesses to obtain a license to sell items "designed

or marketed for use with illegal cannabis or drugs[.]" *Id.* at 492. In its majority opinion, this Court stressed that the challenged ordinance did not directly restrict speech. *Id.* at 496 (stating "the village does not restrict speech as such" and "insofar as any *commercial* speech interest is implicated here, it is only the attenuated interest"). Additionally, the ordinance at issue in *Hoffman Estates* was challenged as vague because it did not provide adequate notice of what conduct was proscribed, not because the regulation allowed for arbitrary enforcement. *Id.* at 503 ("no evidence has been . . . introduced to indicate whether the ordinance has been enforced in a discriminatory manner"). Thus, *Hoffman Estates* is off the mark.

HLP similarly is inapposite, for the primary reason that it did not involve a facial vagueness challenge at all. *See Holder*, 130 S. Ct. at 2712. It is an unremarkable position to say that a court may not decide an as-applied challenge – the type of claim brought in *HLP* – on the basis of situations and parties not before the court. Additionally, as in *Hoffman Estates*, the law at issue in *HLP* was not challenged on the basis that it may lead to arbitrary enforcement practices. *HLP*, 130 S. Ct. at 2719-20. Thus, *HLP* is not applicable to this case.

In the instant case, this Court granted *certiorari* on the broad question of whether the Commission's "current indecency enforcement regime violates the First or Fifth Amendments to the United States Constitution." The question presented to this Court is thus not limited to an "as applied" challenge. Additionally, the FCC's indecency regulation is challenged for allowing

discriminatory and arbitrary enforcement, which necessarily requires considering how the Commission might enforce the statute against others in the future. *See Fox Television Stations, Inc.*, 613 F.3d at 332-33 ("With the FCC's indiscernible standards comes the risk that such standards will be enforced in a discriminatory manner.").

Because the FCC's indecency regulation is subject to a facial challenge, directly restricts broadcasters' constitutionally protected freedom of speech, and allows for arbitrary enforcement, the Court may consider the Fifth Amendment interests of all broadcasters subject to the FCC's indecency regime, even if Respondents' speech was clearly proscribed.

B. The FCC's Indecency Regime Violates the Fifth Amendment Because it Permits Arbitrary Enforcement Practices

The standard that the FCC now uses to determine whether a program is patently offensive renders the Commission's indecency regime unconstitutionally vague. The Commission arrogated to itself too much discretion when it enlarged the scope of its indecency standard, violating the Fifth Amendment.

The FCC has erected an indecency enforcement structure that allows it to consider (or not consider) any contextual factor, whether previously noted as relevant or not, in sum or in isolation, to determine whether a program is

patently offensive. This is the essence of an unconstitutionally vague system. In one ruling, the Commission may claim that a program's "*full context*" will be considered, *Industry Guidance*, 16 F.C.C. Rcd. at 8002 ¶ 9, but in another it may make a "patently offensive" determination exclusively based on the interplay of three contextual factors, *see, e.g.*, *Omnibus Order*, 21 F.C.C. Rcd. at 2668 ¶ 13, and yet in some "particular cases" the Commission may state that any single contextual factor will lead to an indecency determination by itself, *id.* Although some contextual considerations may sometimes excuse a program, *Saving Private Ryan Order*, 20 F.C.C. Rcd. at 4512-13 ¶ 14, to what extent is unknown, *Omnibus Order*, 21 F.C.C. Rcd. at 2685 ¶ 77, 2688-89 ¶ 93 (terms used in a documentary and a film "patently offensive"). The Commission's current indecency regime allows it to rationalize any enforcement ruling without any indication how it will rule in the future and, under a "*full context*" approach, to apply new and yet-unpublished contextual factors to rationalize the desired outcome.

The post-2001 standard has resulted in arbitrary and irreconcilable enforcement results within any given subject matter. Take, for instance, the Commission's treatment of programming related to oral sex. Broadcasters may air programming on the topic of oral sex, but the extent is uncertain given Commission enforcement actions.

According to Commission precedent, a broadcaster may refer to a penis using the term "dickhead," *Omnibus Order*, 21 F.C.C. Rcd. at 2696 ¶ 127 (not sufficiently vulgar, explicit or graphic),

may use the term "suck[]," *id.* at 2715 ¶ 208 (term "sucked" is "not an explicit or graphic description of sexual . . . activities"), and may even refer to someone as a "six foot blow job machine," *In re KBOO Found.*, 18 F.C.C. Rcd. 2472, 2474 ¶ 9 (EB 2003) (phrase not sufficiently graphic), *rescinding*, 16 F.C.C. Rcd. 10731 (EB 2001). However, a broadcaster may not refer to cunnilingus as "eating pussy." *In re Infinity Radio License, Inc.*, 19 F.C.C. Rcd. 5022, 5024 ¶ 8 (2004) (phrase sufficiently "graphic, explicit, crude and vulgar"). In these cases, the graphic nature of the description was a critical, if not a determinative contextual consideration, yet the Commission offered no explanation as to why the term "eating pussy" is more graphic than "blow job." The Commission's subjective determination as to a single contextual factor can be all-important, highlighting why the lack of discretionary guardrails is so troubling. *See Omnibus Order*, 21 F.C.C. Rcd. at 2668, ¶ 13 (any "one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive . . . or, alternatively, removing the broadcast material from the realm of indecency").

Additionally, the Commission has ruled that depicting a woman performing fellatio on television through transposed images and insinuation is not sufficiently graphic to warrant Commission action. *Omnibus Order*, 21 F.C.C. Rcd. at 2714 ¶ 206 (male actor naked from the waist up while female actor was given "the appearance of her performing oral sex on the man"). However, loosely describing fellatio techniques is sufficiently graphic when done on the radio. *Letter to Citicasters Co.*, 13 F.C.C.

Rcd. 22004, 22010 (1998) (January 18, 1998 broadcast on WXTB-FM containing phrases such as, "What if I can't fit it into my mouth?"). Again, the Commission offered no rationale to explain why depicting fellatio on the television is not as graphic as a clinical discussion of oral sex techniques on the radio.

Furthermore, the Commission has arbitrarily determined what constitutes pandering, titillating, or shocking programming in connection to broadcasts discussing oral sex. In the *Omnibus Order* the Commission ruled that an episode of the Oprah Winfrey Show was not patently offensive because it was not presented in a pandering or titillating manner. *Omnibus Order*, 21 F.C.C. Rcd. at 2706 ¶¶ 177-78. In that program, a commentator described a "salad toss" as "oral anal sex" and a "rainbow party" as a gathering of multiple women who each apply lipstick and then perform fellatio on a male. *Id.* at 2705 ¶ 173. The Commission stated that the program was "highly graphic" and continued "at length," yet was not patently offensive because it was not pandering or used to shock the audience. *Id.* at 2706 ¶ 177. However, when a radio broadcaster invited Dr. Natasha Terry, a certified clinical sexologist, to describe oral sex techniques, the Enforcement Bureau found the program to be patently offensive apparently exclusively because it was "pandering and titillating." *In re Citicasters Co.*, 15 F.C.C. Rcd. 19095, 19096 ¶ 6 (EB 2000). The Bureau stated that the program, which aired statements such as "she should go up and down the shaft about five times, licking and sucking and on the fifth swirl her tongue around the head before

going back down," was proven to be pandering and titillating because a radio host laughed during the discussion and made statements such as "oh yea, baby." *Id.* This illustrates one of the infirmities of the Commission's "contextual" approach, since it apparently is the Commission's view that a phrase can become sanctionably indecent based on how a listener reacts *after* it has already been said.

The above-cited examples highlight how arbitrary the Commission's "patently offensive" standard has become. The FCC has not attempted to reconcile its arbitrary enforcement determinations, nor could it. What the Commission considers actionably "graphic" or "pandering" programing is a mystery, yet all-important. *See Omnibus Order*, 21 F.C.C. Rcd. at 2668 ¶ 13.

Outside of programming discussing oral sex, the Commission's current contextual standard grants it the ability to make discriminatory and arbitrary enforcement decisions. The Commission's free-floating standard allows it – a government agency – to determine what constitutes "news" programming. *See Remand Order*, 21 F.C.C. Rcd. at 13327-28 ¶¶ 70-73. Any such determination carries an inherent risk of discriminatory enforcement. *See Branzberg*, 408 U.S. at 703-04. Additionally, FCC precedent allows the Commission to categorically excuse news programming from indecency violations in practice while claiming that no such categorical exception exists, *Remand Order*, 21 F.C.C. Rcd. at 13327-28 ¶¶ 71-73, or claim that news programming is unlikely to incur indecency liability because it is not pandering or titillating while claiming that such a determination is not necessary to an indecency

finding, *see Industry Guidance*, 16 F.C.C. Rcd. at 8014 ¶ 23 ("The absence of a pandering or titillating nature, however, will not necessarily prevent an indecency determination . . . ."); *Letter to Mr. Peter Branton*, 6 F.C.C. Rcd. 610. Faced with these contradictory interpretations, a broadcaster must presume that the less forgiving of two will apply and behave accordingly – chilling speech.

The Commission's on-again, off-again application of its undefined "artistry" exception further illustrates the regulation's arbitrary nature. In its *Omnibus Order*, the Commission stated that explicit language used in a documentary warranted enforcement action. *Omnibus Order*, 21 F.C.C. Rcd. at 2685 ¶ 77. However, in other films, the FCC has stated that explicit terms may be integral to an artistic work and therefore not patently offensive. *Saving Private Ryan Order*, 20 F.C.C. Rcd. at 4512-13 ¶ 14. When making these determinations, the Commission has not – because it cannot – attempted to articulate *why* certain terms used in a film were pandering and titillating. *See Omnibus Order*, 21 F.C.C. Rcd. at 2688-89 ¶ 93 (stating, *ipse dixit*, that a film's use of the "S-word" was used to "titillate the audience"). If the Commission began explaining why certain terms were "titillating" in one instance but "integral" in another, it would narrow the indecency regime's scope and limit the FCC's authority to make future determinations, something the Commission is willing to avoid at all costs.

When the government purports to sit in the director's chair and make after-the-fact determinations about whether profanity is artistically necessary – or "integral" if the

Commission prefers – the potential for viewpoint-based abuse is readily apparent. Even if regulators go into the exercise with the best of intentions, it is impossible to divorce an assessment of artistic merit from personal taste, and the programs at greatest risk of being labeled insufficiently artistic disproportionately will be those appealing to niche or "counter-culture" audiences with non-mainstream tastes.

In sum, as the FCC currently understands the phrase, "patently offensive" grants it a free-floating license to sanction one broadcast while comparable broadcasts go unpunished without any indication of how the Commission will act in the future. As a result, the FCC's indecency standard – as currently applied by the Commission – violates the Fifth Amendment.

The threat of erratic FCC action is especially harmful to collegiate broadcasters who do not have experience navigating FCC indecency precedent. The FCC has many times acknowledged that it licenses spectrum to unsophisticated broadcasters and in fact designates swaths of spectrum to be used by individuals who may not have any broadcast experience at all. *In re Creation of a Low Power Radio Service*, 15 F.C.C. Rcd. 2205, 2206 ¶ 1 (2000) (the low power FM radio service "will provide opportunities for new voices to be heard and will ensure that we fulfill our statutory obligation to authorize facilities in a manner that best serves the public interest"), *reconsidered in*, 15 F.C.C. Rcd. 19208 (2000). The Commission has even taken steps to make it easier for inexperienced broadcasters to license spectrum from the FCC. *See In re Creation*

of a Low Power Radio Service, 22 F.C.C. Rcd. 21912, 21944 ¶ 78 (2007) ("This tool enabled unsophisticated potential applicants to identify without expense available FM spectrum in their local communities.").

The Commission's commitment to licensing spectrum to unsophisticated entities is further demonstrated by regulations regarding university-licensed broadcast frequencies. The FCC allows universities to license frequencies by creating an exception to its rules in order to "promote our goals of maximizing diversity of ownership in a community and providing a medium for new speakers, including students, to gain experience in the broadcast field." *In re Creation of Low Power Radio Service*, 15 F.C.C. Rcd. at 19241 ¶ 84. When licensing a low power FM station to a university under these rules, the FCC mandates that the station "be managed and operated by students of the university, although as the licensee, the University must retain ultimate control of the station's operations." *Id.* FCC Commissioner Michael Copps recently noted the unique benefit that collegiate-run radio stations offer their community in an interview with WPTS (FM), a radio station run by the students of the University of Pittsburgh. *Audio of our Interview with FCC Commissioner Michael J. Copps*, 92.1 WPTS, http://wptsradio.org/?tag=indecency. Thus, not only has the FCC acknowledged that it will license spectrum to inexperienced and unsophisticated individuals, but it actually promotes the practice.

III. The FCC's Indecency Regulation Has A Disparate and

Demonstrated Chilling Effect on Student Broadcasters

The FCC's vague indecency regime has chilled and continues to chill student broadcasters' speech. The Commission has acknowledged that college and other hyper-local broadcasters serve a unique role in informing their community. The FCC's vague indecency standard, however, hampers these broadcasters' ability to fulfill their mission.

A. Student Broadcasters Serve a Unique Role in Informing Their Community

Student and other local broadcasters are uniquely suited to serve their communities. According to the Commission, these entities have played a major role in serving the public when most in need. *The Info. Needs of Communities*, FEDERAL COMMUNICATIONS COMMISSION, 2011 WL 2286864 at *68, *196 (June 2011). Recently, FCC Commissioner Copps said that college broadcasters "have an increasingly important role to play in the media age in which we live if we are not going to completely lose sight of what is happening in our communities . . . ." *Audio of our Interview with FCC Commissioner Michael J. Copps*, 92.1 WPTS, http://wptsradio.org/?tag=indecency.

Student and other hyper-local broadcasters also present a uniquely democratic form of communication. As the Commission approvingly noted, licensing frequencies to non-sophisticated broadcasters allows for "highly local radio stations grounded in their communities." *In re Creation of a*

Low Power Radio Service, 15 F.C.C. Rcd. at 2208 ¶ 3. These local broadcasters, who include members of under-represented minorities, are often best able to serve their communities because they are in fact part of that community. *Id.* at 2213 ¶ 17.

Thus, collegiate and other hyper-local broadcasters have a unique role to play in informing the public. These broadcasters are best able to inform their communities about local issues and the Commission has commended them for doing so. However, the FCC's overbroad and vague indecency regime has impaired broadcasters' ability to realize their potential.

B. The FCC's Indecency Regime Has Made it Difficult for Student Broadcasters to Serve Their Community Adequately

The FCC's overbroad and vague indecency regulation has stifled college broadcasters' attempts to serve their communities. College broadcasters are in no way exempt from FCC indecency sanctions and their chilling effect. Indeed, the FCC has twice ruled that collegiate radio stations violated the indecency regime. *See In re State Univ. of N.Y.*, 13 F.C.C. Rcd. 23810 (1998) ($4,200 forfeiture ordered against WSUC (FM), licensed to the State University of New York and operated by students at Cortland University); *In re The Regents of the Univ. of Cal.*, 2 F.C.C. Rcd. 2703 (1987) (song lyrics broadcasted by KCSB (FM) "constituted actionable indecency" although no forfeiture ordered). The indecency regime also applies to non-commercial

stations. *See In re KBOO Found*, 16 F.C.C. Rcd. 10731 (song lyrics were patently offensive), *rescinded by*, 18 F.C.C. Rcd. 2472 (FCC "now conclude[s] that the broadcast was not indecent").

Communities are often best served through live local broadcasts. Live broadcasts are inherently unscripted and unpredictable, posing a unique risk that someone will blurt profanity at times even unbeknownst to a careful broadcast technician. The FCC's current indecency regime deters broadcasters from offering valuable live programming, which may result in heavy financial penalties.

Live broadcasting is essential in the face of a natural disaster or emergency. *See The Info. Needs of Communities*, 2011 WL 2286864, at *68, *196. Live broadcasting of news events promotes listener calls and comments, thereby furthering civic participation. Additionally, live broadcasting ensures that listeners are able to gather timely and unfiltered information to make important decisions. Finally, live broadcasting is the only viable means to present certain programming. In the age of the Internet and social media, it is not viable to delay the broadcast of programs such as popular sporting events. If CBS had to scrub-clean its upcoming Super Bowl broadcast to make sure that a sideline microphone did not broadcast a fan swearing at a referee, it could delay the program's broadcast to the point of appearing untimely to an audience following the action via online media. As this Court has noted in other contexts, being the first to publish information can carry with it viability. *See Harper & Row v. Nation Enter.*, 471 U.S. 539, 562 (1985) (there is a commercial interest inherent in "first

publication"). Live broadcasting must be preserved to ensure an informed public and the vitality of broadcasting.

The FCC states that it has "long recognized that it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event under some circumstances." *Remand Order*, 21 F.C.C. *Rcd.* at 13311-12 ¶ 33. However, the Commission has gone out of its way to avoid explaining what "circumstances" excuse a broadcaster from unintentionally airing indecent content during a live broadcast. *Id.* at 13311-12 ¶ 33, 13325 ¶ 62. It appears the only known rule in the FCC's "long recognized" policy is that the Commission will fine a broadcaster for airing indecent material if the licensee was "on notice" that a third party might use, and the licensee thereby broadcast, indecent language. *Golden Globes Order*, 19 F.C.C. Rcd. at 4979 ¶ 10. By that logic, a broadcaster at any live event might arguably be liable for broadcasting a stray expletive because broadcasters should be on notice that people at public events sometimes use indecent language. As recognized by the Second Circuit, this "notice" concept will also induce broadcasters to steer clear of interviewees who have ever used salty language, *see Fox Television Stations, Inc.*, 613 F.3d at 332, even if there is an overriding public interest in their remarks. Thus, the FCC's indecency regime chills college broadcasters' ability to confidently broadcast live sporting and news events.

Additionally, the Commission's indecency policy restricts broadcasters' ability to offer a

community desired music and entertainment. Although we all may be nostalgic for a simpler time, the reality is that George Carlin's vocabulary words have become commonplace in the mainstream entertainment enjoyed by tens of millions of people. The Academy of Motion Picture Arts and Sciences – the arbiter of artistic achievement in American cinema – presented an Oscar in March 2006 to the rap artists Three Six Mafia, a musical act popular among college audiences that frequently performs on campuses, for their gritty song, "It's Hard Out Here For a Pimp," which includes the lyric: "It's fucked up where I live, but that's just how it is." Three Six Mafia, *It's Hard Out Here For a Pimp, on* HUSTLE & FLOW SOUNDTRACK (Atlantic Records 2005). For better or for worse, we live in a society (a "community," if the Commission prefers) in which coarse language is now routine – and nowhere more so than in the music favored by college audiences.

The popular music television network MTV maintains a subsidiary channel, mtvU, designed to serve college students with the programming they enjoy. On March 16, 2011, mtvU held its "Woodie Awards" ceremony, which honors the musicians whose work is "voted 'best' by the US college audience." *About the Show*, http://www.mtv.com/ontv/woodieawards/2011/about.jhtml. This year, the artist Wiz Khalifa won "Woodie of the Year" for his song "Black & Yellow." Wiz Khalifa, *Black and Yellow* (Rostrum Records 2011). That song contains the phrases "Bitches love me 'cause I'm fuckin' with their best friends" and "She wanna fuck with them cats, smoke weed, count stacks." A college student (or young child) wishing to

hear the song regarded by young people as the year's best could do so by accessing it on the Internet, *see Reno v. ACLU*, 521 U.S. 844, 874 (1997), accessing it on a cable program such as mtvU, *see United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813-14 (2000), or could have a friend play it over the phone, *Sable Comm. Of Cal. v. FCC*, 492 U.S. 115 (1989), but could not hear it on the radio. What constitutes harmful or taboo speech is allowed to evolve in every other format of communication, but the FCC's indecency regime freezes societal norms in over-the-air broadcasting.

Although the *Pacifica* plurality upheld the Commission's indecency rules in the limited context of a one-of-a-kind program that "represented a rather dramatic departure from traditional program content . . . ," *Reno*, 521 U.S. at 867, there is no "dramatic departure" in playing the chart-topping songs of the day; that is, and long has been, the bread-and-butter of radio programming. Rather, the "dramatic departure" is in telling listeners waiting to hear their favorite songs to check back at midnight. It was rare in George Carlin's heyday for a chart-topping song to use the word "fuck," but the popularity of songs such as "Black & Yellow" indicates just how community standards can and must be allowed to evolve. College broadcasters are not permitted to offer their community the entertainment programming that its members routinely enjoy, unless they alter that programing by replacing or "bleeping" indecent terms. Doing so changes the meaning and impact of an artist's expression. *See Cohen*, 403 U.S. at 25. Thus, the FCC's indecency regime unduly hampers collegiate

broadcasters from offering their community the programming it desire.

To avoid liability, the FCC offers broadcasters two options. First, broadcasters may time-channel their programming. Restricting speech between the hours of 6:00 a.m. and 10:00 p.m. is "a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection." *Playboy Entm't Grp.*, 529 U.S. at 812. Time-channeling restricts broadcasters from offering programming at the times of peak audience interest. For instance, radio broadcasts are most popular during "drive times," which may last anywhere from 6:00 a.m. – 10:00 a.m. and 3:00 p.m. – 7:00 p.m. NORMAN A. P. GOVONI, DICTIONARY OF MARKETING COMMUNICATIONS 63 (2004). During these time periods, significantly more people are listening to the radio. Yet, at precisely the time that a collegiate broadcaster could reach the most substantial portion of his or her community, the FCC restricts speech in a manner that is arbitrary, inconsistent and contrary to the First Amendment.

Second, the FCC advises that broadcasters may purchase "delay" technology. *Remand Order*, 21 F.C.C. Rcd. at 13311 ¶ 32. However, the technology that the FCC suggests broadcasters purchase is remarkably expensive for a collegiate or hyper-local broadcaster. The AirTools 6100, a standard broadcast audio delay technology, retails for over $2,500. To implement that technology, additional in-studio audio equipment, new and expensive computer software, multiple employees, and training may be needed.

Moreover, "delay" technology is itself vulnerable to human failings. A radio technician, who is focused on the main elements of the broadcast, may overlook the muttered use of an indecent term in the background – but a vigilant advocacy organization may, upon repeated playings, unearth the profanity and bring a complaint. In such a scenario, the FCC may force a broadcaster to pay a fine regardless of the broadcaster's investment in "delay" technology.

Finally, the need for "delay" technology underscores the vagueness and chilling effect that the FCC's indecency regime promotes. By suggesting that broadcast outlets purchase "delay" technology, the Commission thereby expects a college student with little radio experience, no legal training, and her nervous finger on a "delay" button to weigh the FCC's confusing indecency precedent and come up with a definitive conclusion in mere seconds. This is a daunting task, particularly given the fact that the Commission – with its scores of trained attorneys – has had trouble navigating the indecency regime. *See Omnibus* Order, 21 F.C.C. Rcd. at 2699 ¶ 142 (live broadcast "legally actionable") *rev'd, Remand Order*, 21 F.C.C. Rcd. at 13328 ¶ 72 (live interview not actionably indecent); *In re KBOO Found*, 16 F.C.C. Rcd. at 10733 ¶ 8 (broadcast actionably indecent) *rescinded by*, 18 F.C.C. Rcd. at 2474 ¶ 9 (broadcast not indecent). Given the unique characteristics of college radio, "delay" technology forces a student broadcaster to make a choice: self-censor every questionable term, thereby eliminating the speech from the marketplace of ideas, *see Golden Globes Order*, 19

F.C.C. Rcd. at 4979 ¶ 9 (FCC will fine for one-time use of an expletive), or risk the station's future. The existence of a delay button does not obviate the FCC's unconstitutional chilling of speech – to the contrary, it *gives effect* to the chilling.

In sum, the FCC's indecency regime restricts college broadcasters' ability to fulfill their communities' news and entertainment needs. There is a distinct interest in providing communities with live, cutting edge and local broadcasting. However, the FCC makes it impossible for college broadcasters to offer programming without risk or fear. Student broadcasters are restricted from providing their fellow students with popular programming available in every other medium. As a result, this Court should strike the FCC's indecency regime in order to allow student broadcasters to serve their communities adequately.

C. The FCC's Vague Indecency Regime Has Chilled Speech and Forced Student Broadcasters To Engage In Demonstrated Self-Censorship

The FCC's vague indecency regulation has forced student broadcasters to institute chilling self-censorship policies. Vague regulations chill speech by forcing would-be speakers to self-censor and "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). Given the unique characteristics of collegiate broadcasting, the FCC's policies have had a tangible

chilling effect.

Student broadcasting outlets rarely, if ever, generate enough revenue to offset their costs and are often a cost center to the host institution. The Commission should not penalize these host institutions for providing students with the educational opportunities. Student broadcasters pride themselves on being public service related learning institutions more than money-making operations. *In re Creation of Low Power Radio Service*, 15 F.C.C. Rcd. at 2213 ¶ 17.

Under current regulations, the FCC may fine a licensee as much as $325,000 for *each* indecent utterance. 47 C.F.R. § 1.80(b)(1). The Commission may reduce forfeiture amounts if it would cause a licensee undue financial hardship. However, the Commission will only consider the financial standing of the named licensee when making such a determination. *See In re Tri-State Univ.*, 24 F.C.C. Rcd. 4961, 4963-64 ¶ 9 (MB 2009). College broadcasting outlets are often operated by students but licensed to the university itself. As a result, the FCC will not reduce a forfeiture amount even if it exceeds the broadcaster's entire annual budget because it is the university's finances, not the student operated broadcaster's finances, that the Commission considers. *See In re State Univ. of N.Y.*, 13 F.C.C. Rcd. at 12811 ¶ 5 (1987) (original forfeiture amount exceeded the station's budget). Given the often altruistic character of college broadcasting and the FCC's policy regarding forfeiture reduction, an FCC indecency fine would "[a]bsolutely kill" a collegiate broadcasting outlet. Robert Arcamona, *Dirty Words*, STUDENT PRESS LAW

CENTER REPORT, Fall 2008, at 31. Indeed, when Cortland University's student radio station was fined in 1987 for broadcasting indecent terms, the university "shut down the station to resolve the problem . . . ." Steve Knopper, *College Radio Suffers Growing Pains*, BILLBOARD, July 9, 1994, at 84. In essence, the FCC's indecency policy has the very real potential to sink successful hyper-local broadcasters who serve a uniquely beneficial role in society.

The threat of financial ruin, combined with the FCC's arbitrary indecency enforcement precedent, has chilled collegiate broadcasters' speech. The FCC has forced collegiate broadcasters to adopt policies that favor self-censorship over free speech. For instance, WXUT-FM is operated by the students of the University of Toledo but owned by the university itself. In its manual, the station acknowledges that broadcasters often will not know what speech is prohibited by the FCC and should engage in aggressive self-censorship. *Obscenity/Indecency Policy, WXUT-FM*, http://wxut.pbworks.com/f/Obscenity.pdf (students "must carefully monitor what we say and play. WHEN IN DOUBT, DON'T"). Similarly, KWUR-FM, which is operated by the students of the Washington University in St. Louis but owned by the university, warns students, "If you have to think about it, don't say it." *The KWUR Bible*, oldsu.wustl.edu/file.php?id=545. At WESN-FM, a station licensed to the Illinois Wesleyan University, students are told that on-air policies are in place "due to either a campus policy or an FCC regulation" and warned that students may not

discuss "anything that graphically or explicitly describes sexual or 'potty' functions or activities." *The WESN DJ Manuel*, http://www.iwu.edu/~wesn/info/djmanual.htm.

In sum, the FCC's indecency policy has a disparate impact on student broadcasters. Hyper-local broadcasting offers unique benefits to society, but the FCC's indecency regime has hampered local broadcasters' ability to offer the very programing that the Commission commends as singularly valuable. Given the unique financial characteristics of student broadcasting, the FCC's indecency regime has led to rampant self-censorship. As a result, this Court should strike down the FCC's indecency regime as it is currently understood and allow student broadcasters to fulfill their community-service mission.

CONCLUSION

For the foregoing reasons, *amici curiae* submit that the ruling of the court below should be AFFIRMED.

Respectfully Submitted,

GREGORY STUART SMITH
COUNSEL OF RECORD
LAW OFFICES OF GREGORY S. SMITH
1627 I (Eye) Street, NW
Suite 1100
Washington, DC 20006
(202) 460-3381
Gregsmithlaw@verizon.net

FRANK D. LOMONTE
STUDENT PRESS LAW CENTER
1101 Wilson Boulevard
Suite 1100
Arlington VA 22209-2275
(703) 807-1904
Flomonte@splc.org

AMICUS CURIAE BRIEF

No. 10-1293

In the
Supreme Court of the United States

Federal Communications Commission, Et Al.,

Petitioners,

v.

Fox Television Stations, Inc. Et Al.,

Respondents

Federal Communications Commission, Et Al.,
Petitioners,

v.

ABC, Inc. Et Al.,
Respondents

On Writ of Certiorari to the
United States Court Of Appeals
for The Second Circuit

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE IN SUPPORT OF RESPONDENTS

J. Joshua Wheeler*
The Thomas Jefferson Center For
The Protection Of Free Expression
400 Worrell Drive
Charlottesville, Va. 22911
434-295-4784
*Counsel Of Record for *Amici*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. *FCC V. Pacifica*, And By Extension 18 U.S.C. § 1464, Should Be Invalidated Because They Violate The First Amendment. 4

A. *Pacifica* Impermissibly Created A Novel Category Of Unprotected Speech 5

i. "Indecent" Speech Cannot Be Regulated As Such Under The Stevens Standard Because It Is Not A Historically-Recognized Exception to First Amendment Protection 7

ii. This Court Has Declined To Create Additional Categories Of Unprotected Speech In Similar Contexts. 10

iii. The FCC's Current Regulatory Scheme Is Not Consistent With Time, Place, And Manner Restrictions. 10

B. Overturning Pacifica Would Align With This Court's Jurisprudence on *Stare Decisis* And The First Amendment.....13

i. *Stare Decisis* Does Not Protect Past Decisions That Violate Core First Amendment Principles.....13

ii. The Justifications In *Pacifica* Are No Longer Operative In Today's Media Landscape.....15

1. Most Viewers Have both Cable And Broadcast Television, Delegitimizing The "Pervasiveness" Argument In Pacifica 16

2. The "Captive Audience" Doctrine Has No Applicability In The Context Of Media Viewed Privately In The Home.....17

3. Children Cannot Be considered More Of A Captive Audience In The Broadcast Media Context Than Any Other Technology.....19

4. Radio Listeners Can Listen To Satellite Services And Internet Radio On A Multitude Of Devices 21

C. More Narrowly Tailored Alternatives Exist Than The FCC's Safe Harbor Provision.....22

i. *Playboy* Provides The Operative Framework For Analyzing The FCC's Time-Based Content Censorship 23

ii. The V-Chip Now Places Broadcast Television On Equal Footing With Cable And Satellite 25

II. Even If *Pacifica* Is Retained, The FCC'S Current Indecency Enforcement Regime Unconstitutionally Chills Protected Speech 27

A. The FCC's Vague Indecency Standards Chill Speech That Is Undeniably Protected by the First Amendment. 28

B. The FCC's Erratic Enforcement Regime Validates This Court's Concerns About Vesting Administrative Agencies with Unrestricted Regulatory Discretion Over Protected Expressive Activities. 31

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 14, 15

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 32

Blount v. Rizzi,
400 U.S. 410 (1971) 32

Brandenburg v. Ohio,
395 U.S. 444 (1969) 5

Brown v. Entm't Merchants Ass'n, 564 U.S. ____,
131 S.Ct. 2729 (2011) 4, 5, 10, 20

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 5, 8

Citizens United v. Fed. Election Comm'n, 558 U.S. ____,
130 S.Ct. 876 (2010) ..... passim

City of Lakewood v. Plain Dealer Publg. Co.,
486 U.S. 750 (1988) 32

Cohen v. California,
403 U.S. 15 (1971) 7, 17, 19

Cox v. New Hampshire,
312 U.S. 569 (1941) 11

Dirks v. SEC,
463 U.S. 646 (1983) 33

Erznoznik v. Jacksonville,
422 U.S. 205 (1975) 18

FCC v. Fox Television Stations,
556 U.S. 502 (2009) 1

FCC v. Pacifica Foundation,
438 U.S. 726 (1978) ..... passim

Fed. Election Com'n v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) 14

Fox Television Stations v. FCC,
613 F.3d 317 (2nd Cir. 2010) 1

Ginsberg v. New York,
390 U.S. 629 (1968) 8, 9

Glidden Co. v. Zdanok,
370 U.S. 530 (1962) 14

Grayned v. City of Rockford,
408 U.S. 104 (1972) 28

Helvering v. Hallock,
309 U.S. 106 (1940) 14

Interstate Circuit, Inc., v. City of Dallas,
390 U.S. 676, 689 (1968) 9

Jenkins v. Georgia,
418 U.S. 153 (1974) 8

Joseph Burstyn, Inc. v. Wilson,
343 U.S. 495 (1952) 7

McDonald v. Chicago,
130 S. Ct. 3020 (2010 14

Miller v. California,
413 U.S. 15 (1973) ..... passim

New York v. Ferber, 458 U.S. 747 (1982) 5

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 5

Payne v. Tennessee,
501 U.S. 808 (1991) 14

Reno v. ACLU,
521 U.S. 844 (1997) 7, 18, 20, 31

Renton v. Playtime Theaters,
475 U.S. 41, 54, 48 (1986) 11

Smith v. California,
361 U.S. 147 (1960) 32

Snyder v. Phelps,
131 S. Ct. 1207 (2011) 18

United States v. Am. Library Assoc.
539 U.S. 194 (2003) 27

United States v. Playboy Entm't Group,
529 U.S. 803, 815 (2000) ..... passim

United States v. Stevens,
559 U.S.____; 130 S. Ct. 1577 (2010) 3, 4, 6

Watts v. United States,
394 U.S. 705 (1969) 5

Young v. Am. Mini Theatres, Inc.,
427 U.S. 50, 52 (1976) 11

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment..... passim

2 U.S.C. § 441b.....33

18 U.S.C. § 1464.....4, 30

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. The Center is familiar with the issues presented in this appeal having filed as *amici curiae* when this matter was previously before this Court, *FCC v. Fox Television Stations*, 556 U.S. 502 (2009) and when it was before the United States Court of Appeals for the Second Circuit, *Fox Television Stations v. FCC*, 613 F.3d 317 (2nd Cir. 2010).

The Media Institute is an independent, nonprofit research organization located in Arlington, Va. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive

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[1] Pursuant to S. Ct. R. 37.6, the amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Brit Hume, a Trustee of the Thomas Jefferson Center and an employee of one of the parties, took no part in the decision to file in this case, or in the preparation and submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties' written consent to the filing of amicus curiae briefs is on file with the court.

communications industry, and journalistic excellence. The Institute has participated as *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

SUMMARY OF ARGUMENT

In *United States v. Stevens*, this Court set forth a clear, historical-based standard by which government attempts to expand the categorical exceptions to First Amendment protection are evaluated. 559 U.S. ____; 130 S. Ct. 1577 (2010). In adopting this historical approach, the Court rejected a "simple balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test." *Id.* at 1585. Yet it was exactly such a balancing of interests that was undertaken in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to find constitutional the regulation of indecent material on the broadcast spectrum.

Despite the lack of historical precedent, the *Pacifica* Court held the unique aspects of the broadcast spectrum justified the regulation of indecent content. Whatever the validity of this reasoning in 1978, technological advances have sharply undermined its applicability today. Broadcast media are no longer uniquely pervasive, and new technology provides more effective means than governmental censorship to shield children from indecent content. This Court should therefore reject the reasoning of *Pacifica* and eliminate a

troubling discrepancy in First Amendment jurisprudence.

Yet, even if this Court chooses not to overturn *Pacifica*, it should strike down the FCC's current indecency enforcement regime for its unconstitutional chilling of protected speech. As the FCC expands both the definition of "indecent" speech and corresponding fines, networks increasingly choose to air self-censored versions of programs, even those which are educational in nature. The FCC's inconsistent standards are an illustration of why this Court has, in other areas of regulated authority, carefully restricted the amount of discretion regulatory agencies may have over expressive activities.

ARGUMENT

I. *FCC V. Pacifica*, And By Extension 18 U.S.C. § 1464, Should Be Invalidated Because They Violate The First Amendment.

It is a hallmark of First Amendment law that expression is presumptively protected unless it falls within one of several carefully prescribed exceptions. *Brown v. Entm't Merchants Ass'n*, 564 U.S. ____; 131 S.Ct. 2729, 2733 (2011). "Indecent" expression that falls short of obscenity has never been one of these exceptions. Nevertheless, this Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), sanctioned the content-based regulation of such speech when it occurs over broadcast media. In doing so, the Court relied upon statutory language that establishes criminal and civil punishments for anyone who utters "indecent . . . or profane language by means of radio communication." 18 U.S.C. § 1464. Such regulation of protected First Amendment speech lacks historical precedent and is unwarranted by any prominent component of our nation's legal traditions. It thus cannot be justified under the standard endorsed recently by this Court in *United States v. Stevens* for evaluating government attempts to expand the long-recognized categorical exceptions to First Amendment protections of speech and press. 559 U.S. ____; 130 S. Ct. 1577 (2010).

Given the holding in *Stevens*, *Pacifica* should be reversed in its entirety, and those parts of 18 U.S.C. § 1464 concerning "indecent or profane language" should be nullified. Although cautious about lightly overturning its own precedents, this Court has repeatedly emphasized that *stare decisis* is but a pragmatic policy of judicial restraint. It cannot

be used to shield past decisions that infringe clear constitutional commands. *Pacifica* was such a decision, and *amici* respectfully plead that the Court use this opportunity to rectify a troubling discrepancy in its First Amendment jurisprudence.

A. *Pacifica* Impermissibly Created A Novel Category Of Unprotected Speech.

Indecent but non-obscene expression is protected by the First Amendment. This principle applies even to speech that is "patently offensive" in its reference to "sexual and excretory activities and organs." *Pacifica*, 438 U.S. at 732 (quoting 56 F.C.C.2d 94, 96). It does not belong to those "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[2] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942). In adopting this historical approach, the Court has firmly rejected a "simple balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test." *Brown*, 131 S.Ct. at 2734 (quoting *Stevens*, 130 S.Ct. at 1585) (internal quotation marks omitted).

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[2] This Court has addressed the forms of non-protected speech in a number of prior decisions. See *Miller v. California*, 413 U.S. 15, 24 (1973) (obscenity); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (speech inciting lawless activity); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) ("true threats"); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

In permitting the censorship of "indecent" broadcast expression, the majority in *Pacifica* rejected the traditional categorical approach later reaffirmed in *Stevens*. *See Pacifica*, 438 U.S. at 763 ("[A]ll members of this Court agree that the [speech at issue] . . . does not fall within one of the categories of speech . . . that is totally without First Amendment protection.") (Brennan, J., dissenting). It sanctioned the FCC order at issue despite the fact it proscribed otherwise protected expression – that is, speech beyond what was strictly obscene under *Miller v. California*. *See Pacifica*, 438 U.S. at 740-41 ("Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."). The Court justified this departure from tradition by identifying certain unique qualities of the broadcast medium. *Id.* at 748-50.

While both respondents and *amici* (*see* Part I.B.ii, *infra*) argue that these "unique qualities" have effectively eroded over time, the doctrinal premise of the *Pacifica* decision is itself erroneous. The medium in which speech occurs does *not* determine the standard by which its content-based censorship is evaluated. Whether such regulation survives scrutiny turns on whether the speech belongs to a historically-recognized categorical exception to the First Amendment. *Stevens* made this point undeniably clear. *See Stevens*, 130 S.Ct. at 1584 ("From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas and has never include[d] a freedom to disregard these traditional limitations.") (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991)

(Kennedy, J., concurring)) (internal quotation marks omitted).

The *Pacifica* Court cited *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952), to support its conclusion that "each medium of expression presents special First Amendment problems." *Pacifica*, 438 U.S. at 748. In *Burstyn*, this Court invalidated a licensing scheme that permitted state administrative officials to ban motion picture films that they determined to be "sacrilegious." 343 U.S. at 497. Although the Court noted that "[e]ach method [of expression] tends to present its own peculiar problems," it immediately concluded that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles . . . make freedom of expression the rule." *Id.* at 503. This holding *undermines* the media-centric premise of the *Pacifica* decision, and it reflects the categorical standard ratified by this Court in *Stevens*. It also accords with other recent decisions holding that First Amendment strictures on content discrimination do not fluctuate with the form of media being employed. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (internet).

i. **"Indecent" Speech Cannot Be Regulated As Such Under The *Stevens* Standard Because It Is Not A Historically-Recognized Exception to First Amendment Protection.**

This Court has stated emphatically that "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions." *Cohen v.*

California, 403 U.S. 15, 24 (1971). "Indecency" and "profanity" are not among the list of such exceptions. While "lewd" and "profane" are among the unprotected categories suggested by *Chaplinsky*, this Court's holdings in obscenity cases have clarified that lewd and profane materials are to be prohibited only when they satisfy the requirements of the *Miller* standard for obscenity. In deciding whether a work is obscene, the triers of fact must consider: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24 (internal citations omitted). This Court has made it clear that sexually explicit material does not lose its protected status unless it meets the *Miller* standards for obscenity. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974). The FCC's regulatory scheme cannot, therefore, be justified by the existence of obscenity law or by historical references to censorship of "lewd" materials.

Prior to its decision in *Miller*, the Supreme Court held that a state may consider the age of the potential viewer in determining whether the material is obscene when limiting distribution of obscene material to minors. *Ginsberg v. New York*, 390 U.S. 629 (1968). This holding was unaltered by *Miller*, and the *Miller/Ginsberg* holdings are now key when assessing the constitutionality of any governmental effort to restrict or prohibit distribution of obscene materials to minors. The

Miller/Ginsberg standard, therefore, should be the constitutional limit of restrictions on materials that merely *may* reach minors, absent factors that would allow such a restriction to pass strict scrutiny.

The *Ginsberg* ruling was strikingly and specifically limited in scope. Rather than establish another separate and distinct exception to First Amendment protection, the Court allowed the regulation of the materials in question because they conformed to the standards of a previously defined exception – obscenity – as specifically applied to minors. *Ginsberg*, 390 U.S. at 636. In *Ginsberg*'s companion case decided the same day, *Interstate Circuit, Inc., v. City of Dallas*, the majority noted, "The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." 390 U.S. 676, 689 (1968). With this caveat, *Interstate* effectively placed a limit on *Ginsberg* similar to *Jenkins*'s limitation on *Miller*, *i.e.*, only by strictly complying with *Ginsberg* may materials that are not obscene for adults be deemed obscene for minors. Regulations on speech may not be left vague with the rationale that this will better protect minors.

The materials prohibited by the FCC do not conform to the *Miller/Ginsberg* standard. Fleeting expletives and nudity must be considered within the context of a television program which otherwise has artistic and political value to its viewers, and which as a whole does not appeal to the prurient interest of a minor. Although arguably there exists the same interest in shielding children from harmful speech, *Ginsberg* and *Interstate Circuit* make clear the fact

that this interest, absent satisfaction of the *Miller* standards as applied to children, is not sufficient to render speech unprotected. The FCC's regulations therefore fall outside the categorical exceptions to First Amendment protection.

ii. This Court Has Declined To Create Additional Categories Of Unprotected Speech In Similar Contexts.

This Court has recently declined to create an additional category of unprotected speech because of its possible harmful effects to children. In *Brown*, this Court was urged to establish portrayals of violence as a new category of unprotected speech and ruled that the ban on sales of violent video games to minors could not survive strict scrutiny. 131 S. Ct. 2729. The regulations at issue here must pass the same scrutiny. This case involves speech that is certainly protected outside of the broadcast context and, as discussed below, there remain no valid justifications for treating broadcast media differently from other media.

iii. The FCC's Current Regulatory Scheme Is Not Consistent With Time, Place, And Manner Restrictions.

The *Pacifica* analysis emphasizes that the FCC is not engaging in censorship of indecent broadcasts but merely "channeling" such broadcasts to a time period in which it is less likely that children will be in the audience. *See* 438 U.S. at 731-32, 750. In this regard, the analysis resembles a time, place, or manner regulation of speech but for one critical

difference: the constitutionality of such regulations is dependent upon their neutrality with respect to the content of speech. *See Cox v. New Hampshire*, 312 U.S. 569, 578 (1941). *Pacifica*, by contrast, sustains the regulation of speech specifically because of its content.

Analogy of *Pacifica*'s "channeling" to the zoning of adult-oriented businesses to particular location is similarly flawed because of the former's focus on content. In *Young v. American Mini Theatres, Inc.*, for example, the city of Detroit amended its "Anti-Skid Row Ordinance" to include the restriction that no adult businesses could be located within 1,000 feet of any two existing adult businesses or within 500 feet of any residential area. 427 U.S. 50, 52 (1976) (plurality opinion). While conceding that the adult establishments were engaged in some protected speech, this Court ultimately upheld the restrictions as valid uses of the city's zoning powers, noting:

> The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. *It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.*

Id. at 71 n.34 (emphasis added). In *Renton v. Playtime Theaters*, this Court also held that a zoning ordinance represented "a valid government response" to the "admittedly serious problems created by adult theaters," and that the ordinance is "completely

consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" 475 U.S. 41, 54, 48 (1986) (citations omitted).

As this Court declared in *United States v. Playboy Entertainment Group*, any attempt to apply the secondary effects rationale to content-based restrictions on protected speech is a fruitless effort. 529 U.S. 803, 815 (2000) (stating emphatically that content-based restrictions must be subject to strict scrutiny). "We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. The statute now before us burdens speech because of its content; it must receive strict scrutiny." *Id.* (citations omitted). Because of the concededly content-based nature of the FCC's indecency regime,[3] the secondary effects doctrine has no applicability and strict scrutiny treatment cannot be avoided on these grounds.

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[3] "So long as the federal government must exercise selectivity in allocating limited spectrum among numerous licensees (and broadcasters benefit from the use of a valuable public resource without charge), it may constitutionally require licensees to accept content-based restrictions that could not be imposed on other communications media." (Pet. Br. 43-44)

B. Overturning *Pacifica* Would Align With This Court's Jurisprudence on *Stare Decisis* And The First Amendment.

Because *Pacifica* deviates so drastically from established First Amendment precedent, it should be overruled in its entirety. *Amici* fully understands the importance of *stare decisis*, and it recognizes that this Court's past decisions are "to be respected unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." *Citizens United v. Fed. Election Comm'n*, 558 U.S. ____, 130 S.Ct. 876, 911-12 (2010). Nevertheless, this Court has made it equally clear that it will not tolerate precedent that infringes upon essential constitutional liberties, particularly in the arena of the First Amendment. *Pacifica* sets just such a precedent. Moreover, the practical foundations that seemingly supported the decision over thirty years ago have eroded so much that its reasoning can no longer be credibly defended.

i. *Stare Decisis* Does Not Protect Past Decisions That Violate Core First Amendment Principles.

Stare decisis may not be employed by the Government to protect a decision that stands as an affront to free speech and an otherwise consistent line of interpretation of the First Amendment for several decades. In determining whether this Court should adhere to the principle of *stare decisis*, the relevant concerns are the continued workability of the precedent, its antiquity, the reliance interests at stake, and the quality of the decision's reasoning. *Citizens United*, 130 S.Ct. at 912 (quoting *Montejo v. Louisiana*, 556 U.S. 778, ____: 129 S.Ct. 2079, 2088-

89 (2009)). Additionally, this Court has examined whether "experience has pointed up the precedent's shortcomings." *Citizens United*, 130 S.Ct. at 912 (quoting *Pearson v. Callahan*, 555 U.S. 223, ____; 129 S.Ct. 808, 816 (2009)).

Stare decisis is not "an inexorable command . . . rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Moreover, this Court has a "considered practice" not to apply this principle of policy "as rigidly in constitutional as in nonconstitutional cases." *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962). This is because "correction through legislative action is practically impossible" in the former case. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Ultimately, *stare decisis* is only an "adjunct of [the Court's] duty as judges to decide by [their] best lights what the Constitution means." *McDonald v. Chicago*, 130 S. Ct. 3020, 3063 (2010) (Thomas, J., concurring).

If anywhere, this notion is particularly applicable in matters concerning the First Amendment. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 130 S.Ct. at 912 (quoting *Fed. Election Com'n v. Wisconsin Right to Life, Inc*, 551 U.S. 449, 500 (Scalia, J., concurring)). Notably, First Amendment cases do not concern property or contractual rights, where reliance interests are most at stake. *Wisconsin Right to Life*, 551 U.S. 502 (Scalia, J., concurring). Indeed, this point can be easily observed in this Court's recent decision in *Citizens United* to reverse *Austin v.*

Michigan Chamber of Commerce, 494 U.S. 652 (1990), which had existed undisturbed for twenty years by the time it was overruled. Quite clearly, this Court has not been circumspect in rectifying disparities between its precedent and core First Amendment protections of free speech and press in favor of the latter.

ii. The Justifications In *Pacifica* Are No Longer Operative In Today's Media Landscape.

This Court should overturn *Pacifica* because the justifications for that ruling are no longer operative in today's media landscape. Time and technology have undermined whatever logical support the holding merited over three decades ago. The dominant position of licensed broadcasting has been steadily eroded by ever-expanding options in television viewing. The impact of licensed broadcasting's content on national mores and values has therefore diminished accordingly. Moreover, the assumption that licensed broadcasters are uniquely capable of inflicting harm on unwary young listeners and viewers has long since been undermined if not wholly repudiated.

In *Pacifica*, this Court noted that broadcasted speech has received the most restricted First Amendment protection. *Pacifica*, 438 U.S. at 731-32, 748. It justified this limitation on two grounds: "[f]irst, the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and "[s]econd, broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 748-49. Neither of these reasons has withstood

the test of time and neither are rational restrictions in today's media landscape.

1. Most viewers Have Both Cable And Broadcast Television, Delegitimizing The "Pervasiveness" Argument In *Pacifica*.

Although broadcast media still constitutes a pervasive presence in the lives of some Americans, it can no longer be considered "unique" and no longer holds up as a justification for specialized limitations on free speech. In 2005, only 14% of American television households limited themselves exclusively to broadcast stations. *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503, 2508 (2006). Of the 109.6 million U.S. households that had cable services in their homes in 2005, 69.4% of those homes had some form of cable television service. *Id.* at 2506. Since this Court's 1978 *Pacifica* decision, the number of cable subscribers has grown from 9.4 million users to 59.8 million in 2010 – a six fold increase in the number of subscribers.[4] Additionally, streaming internet video services like Netflix and Amazon Video on Demand (the former boasting over 20 million subscribers worldwide[5]), and network television streaming video

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[4] National Cable and Telecommunications Association, *Basic Video* Consumers 1975-2010, http://www.ncta.com/Stats/BasicCableSubscribers.aspx.

[5] Securities and Exchange Commission, *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, at 22, http://files.shareholder.com/

websites[6] have continued to draw a large number of consumers.

These numbers represent a significant departure from the broadcast media-dominated landscape that existed during the time of *Pacifica* and undermine the very notion that broadcast television is unique in its pervasiveness. With the rise of digital cable, satellite television, and video on demand options, television media is available for consumption in a wider variety of formats than at any point in history. The once-unique character of broadcast television has become overshadowed by the wide variety of alternative media delivery options, eliminating whatever weak justification remained for treating broadcast media differently.

2. The "Captive Audience" Doctrine Has No Applicability In The Context Of Media Viewed Privately In The Home.

This Court stated in *Cohen* that the "mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." *Cohen v.*

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downloads/NFLX/1497281522x0x460274/17454C5B-3088-48C7-957A-B5A83A14CF1B/132054ACL.PDF.

[6] Perhaps an admission of the rising dominance of internet television streaming, the Nielsen ratings agency added internet views to its ratings numbers starting in 2009. Brian Stelter, *Nielsen to Add Online Views to Its Ratings*, The New York Times (December 1, 2009), http://www.nytimes.com/2009/12/02/business/media/02nielsen.html.

California, 403 U.S. at 21. Although this statement was limited at the time to "captives" outside of the home, the distinction is today superficial. Other information sources, such as cable television and internet, also invade the home but content-based regulation is forbidden under the First Amendment. "We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

This Court also failed to apply the captive audience doctrine with regard to media in *Erznoznik v. Jacksonville*, where it struck down an ordinance regulating drive-in movies. 422 U.S. 205 (1975). As the ordinance only targeted nudity in these movies, it discriminated solely on the basis of content. The Court held that the media was not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it" and stated that "the offended viewer readily can avert his eyes." *Id.* at 212. The same concept applies to broadcast media. Offended individuals are free to avert their eyes, turn off the television or radio, or avoid bringing a television or radio into their home in the first place.

Most recently, the Court denied use of the captive audience doctrine in *Snyder v. Phelps*, a case involving the First Amendment rights of protestors at the funeral of a marine who was killed in the line of duty. 131 S. Ct. 1207 (2011). Describing the extremely restricted and limited use of the doctrine, the Court stated that it has been applied "only sparingly to protect *unwilling listeners*." *Id.* at 1220 (emphasis added). If a man witnessing the protest of his son's funeral is not an unwilling listener, then

watchers and listeners of television and radio who deliberately turn on and choose the programs that they hear are certainly not unwilling either.

Televisions, like any other information source, are voluntarily brought into the home and are turned on and off at the viewer's discretion. Parents can control their children's use of broadcast television in the same way that they can control use of cable television, internet, video games, literature, and countless other forms of media choices. In *Cohen*, the Court limited governmental protection from offensive speech to contexts with "substantial privacy interests." *Cohen*, 403 U.S. at 21. Because of the new pervasiveness of other types of media, these substantial privacy interests no longer exist for television and radio broadcasts.

3. Children Cannot Be Considered More Of A Captive Audience In The Broadcast Media Context Than Any Other Technology.

These changes in the comparative pervasiveness of media have also affected the way the Court should view the impact of accessibility to young children. Although the Court in *Pacifica* believed it was necessary to assist parents in their "authority in their own household," recent decisions have indicated a departure from this paternalistic view. *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629). Although the Court distinguished aspects of its *Reno* decision from *Pacifica* in an effort to avoid diverging from precedent, its statements regarding parental control

support a more modern view of the accessibility of media to children. *Reno v. ACLU*, 521 U.S. 844, 866 (1997). In striking down the restrictions on the internet, for example, this Court stated that "neither the parents' consent – nor even their participation – in the communication would avoid the application of the statute." *Id.* at 865.

Most recently, in *Brown v. Entertainment Merchants Association*, the Court stated:

> [We] note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority. Accepting that position would largely vitiate the rule that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]."

131 S.Ct. 2729, 2740 (2011) (quoting *Erznoznik*, 422 U.S. 205, 212-13 (1975)). Although the *Pacifica* holding attempted to mitigate its impact on free speech by establishing a safe harbor zone between 10:00 PM and 6:00 AM, this is an antiquated system that is not practical in today's society of webcasting and digital video recorders. Not only do time zones create difficulties in actually taking advantage of this safe harbor, but technology allows children to record and later watch programming regardless of the hour it was originally broadcast thereby effectively destroying the "safe" harbor that existed in 1978.

4. Radio Listeners Can Listen to Satellite Services and Internet Radio On A Multitude of Devices.

With the rise of television as an alternative to terrestrial radio broadcasts, radio's growth has slowed in the last half century as compared to television. With the advent of satellite and internet streaming radio, however, new growth in radio listenership has been dominated by these two new forms. After signing "shock jock" Howard Stern in 2004, Sirius satellite radio station saw a significant increase in listeners, contributing to a nearly 500% increase in subscriptions during the year of his defection, and XM Radio similarly saw a 400% rise in listeners that year.[7] Similar to the cable television subscription model, satellite radio services offer a subscription service for a monthly fee, which comes with access to a wider variety of channels and services, and without the geographical limitations of terrestrial radio stations.

In addition to these pay subscription services, internet streaming radio companies like Pandora and Spotify have created another avenue for radio listeners to seek content. Pandora is a free, advertisement-based service that allows users to listen musical artists or genres of their choice directly through the Pandora website or on their mobile devices through a downloadable "app." These kinds of internet streaming services have exploded in

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[7] Daren Fonda, *The Revolution in Radio*, Time (April 11, 2004), http://www.time.com/time/magazine/article/0,9171,610082,00.html.

popularity in recent years, with Pandora boasting over 60 million total listeners in 2010[8] and over 2 million iPhone downloads by 2008.[9] This shift from terrestrial radio to satellite and internet radio has delegitimized the pervasiveness justification in the radio arena – similar to the shift from broadcast television to cable television.

C. More Narrowly Tailored Alternatives Exist Than The FCC's Safe Harbor Provision

In *United States v. Playboy Entertainment Group*, this Court struck down a provision of the Telecommunications Act of 1996 which "require[d] . . . sexually-oriented programming either to [be] fully scramble[d][10] or otherwise fully block[ed]" or confined to "hours when children are unlikely to be viewing . . . 10 p.m. and 6 a.m." 529 U.S. 803, 806 (2000) (internal citations omitted). Because scrambling did not always result in fully blocking audio and video, cable operators felt that

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[8] MG Siegler, *You are on Pandora: Service Hits 60 Million Listeners, Adding Users Faster Than Ever*, Techcrunch (July 21, 2010), http://techcrunch.com/2010/07/21/pandora-stats/.

[9] *2,000,000 Pandora iPhone users!!*, Pandora Blog (December 2, 2008), http://blog.pandora.com/pandora/archives/2008/12/2000000-pandora.html.

[10] "[T]he term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner." Telecommunications Act of 1996, §505, Pub. L. 104-104, 110 Stat. 136, 47 U.S.C. § 561 (1994).

they had "no practical choice" but to confine sexually explicit programming to the allowable 8-hour time period. *Id.* at 809. This Court affirmed the lower court's decision that "a regime in which viewers could order signal blocking on a household-by-household basis presented an effective, less restrictive alternative," and that therefore effectively prohibiting cable operators from airing sexually explicit material for sixteen daytime hours was unconstitutional. *Id.* at 807.

In the instant case, this Court is presented with a similar restriction on television programming between 6 a.m. and 10 p.m. but the material censored by the FCC is notably less explicit than the content at issue in *Playboy*. Although the FCC regulates broadcast television and not cable, the distinction between the two that this Court articulates in *Playboy* is no longer meaningful in light of recent technological advances. (*See* Part I.C.ii., *infra*). Therefore, this Court's consideration of *Playboy* reflects the proper analysis of the issue now before the Court. Because a less restrictive alternative for blocking children's access to indecent material exists today, the FCC's regulatory scheme must be rejected in favor of the alternative.

i. ***Playboy* provides the Operative Framework For Analyzing The FCC's Time-Based Content Censorship.**

In both the instant case and in *Playboy*, "[t]he overriding justification for the regulation is concern for the effect of the subject matter on young viewers." *Id.* at 811. This Court is unambiguous in its analysis:

> As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny. This case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.

Id. at 814. Furthermore, "When the purpose . . . of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *Id.* at 826. Just as in *Playboy*, the fact that television programming is left uncensored between 10 p.m. and 6 a.m. does not redeem the regulation.

This Court, therefore, should apply strict scrutiny and consider alternative means to achieving the government's goals. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* at 813. In *Playboy*, this less restrictive alternative was § 504 of the Telecommunications Act, "which requires a cable operator, upon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block any channel the subscriber does not wish to receive." *Id.* at 809-10 (internal citations omitted). This Court characterized this option as the "key difference between cable television and the broadcasting media, which is the

point on which this case turns." *Id.* at 815. While the analysis of why restrictions on cable television fail strict scrutiny is still valid, this particular distinction – the *key* difference – no longer exists.

ii. The V-Chip Now Places Broadcast Television On Equal Footing With Cable and Satellite.

It is now appropriate to align treatment of broadcast television with the current treatment of cable television. Since 2000, the year of the *Playboy* decision, the FCC has required all new televisions with screens greater than 13" to include the V-chip.[11] As the FCC describes on its website, "[t]he V-chip allows parents or other caregivers to block programming on their televisions that they don't want children to watch." "*Putting Restrictions on What Your Children Watch.*" Ratings similar to that of the Motion Picture Association of America system[12] are encoded into the television program, allowing a parent to block whole channels or to block certain programs based on ratings or sex, violence, and language content. *Id.*

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[11] "*V-Chip – Putting Restrictions on What Your Children Watch | FCC.gov*," Federal Communications Commission, http://www.fcc.gov/guides/v-chip-putting-restrictions-what-your-children-watch (last visited November 8, 2011) ("*Putting Restrictions on What Your Children Watch*").

[12] The FCC's website lists and explains television-specific ratings, such as TV-Y, TV-PG, and TV-MA, as well as the ratings used for movies and established by the Motion Picture Association of America (such as G, PG, PG-13, and R), which are also programmed into V-chips. "*Putting Restrictions on What Your Children Watch.*"

The V-chip is precisely the "digital technology [that] may one day provide [a] solution" to the imperfect scrambling system applied to sexually-explicit cable networks. *Playboy*, 529 U.S. at 808. It is a more precise version of the "less restrictive alternative" that resulted in the censoring provision of *Playboy* being struck down. The V-chip allows television to be tailored not only to minors, but also to those just under the age of majority, or to younger teenagers, or alternatively to young children. "*Putting Restrictions on What Your Children Watch.*" Additionally, the V-chip can be used throughout the day, protecting children from indecent programming even when they watch television past the assumed bedtime of 10 p.m.

This Court acknowledged in *Playboy* that neither the time restriction nor the scrambling technology was perfect: there was "the possibility that a graphic image could have a negative impact on a young child [and] it is hardly unknown for [adolescents] to be unsupervised in front of the television set after 10 p.m." *Playboy*, 529 U.S. at 826. Yet this Court concluded that more strict restrictions on programming were not necessary and not permissible under the First Amendment. *Id.* at 807. The V-chip is thus a less restrictive and more efficient mechanism than the FCC's blanket prohibition on indecency between 6 a.m. and 10 p.m.

This Court has expressed a preference for listeners exercising control over what speech they receive, rather than the government placing limitations on the distribution of speech. The V-chip conforms to this preference, allowing users to easily and consistently block indecent programming or, if

they prefer, to choose from the range of indecent programming offered by networks. This "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners — listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt." *Id.* at 815; *see also United States v. Am. Library Assoc.* 539 U.S. 194, 220 (2003) (Breyer, J., concurring) (relying on the ease with which an adult can overcome blocks on internet sites in concluding that those blocks are constitutionally permitted).

The FCC's indecency regulation scheme is content-based and must be subject to strict scrutiny. In applying strict scrutiny in *Playboy*, this Court has struck down regulation that was similar, but more well-defined and targeted at speech that is arguably more offensive or harmful to children. The distinction between broadcast and cable television is no longer meaningful and the V-chip places broadcast television on equal footing with cable and satellite. Therefore, this Court should overturn *Pacifica* by the reasoning set forth by this Court in *Playboy*.

II. Even If *Pacifica* Is Retained, The FCC'S Current Indecency Enforcement Regime Unconstitutionally Chills Protected Speech.

The FCC's current indecency standard is so vague that broadcasters cannot reasonably predict what speech the agency will censor. As a result, broadcasters are forced to navigate through a maze of inconsistent decisions, which inevitably leads to

the chilling of speech protected by the First Amendment. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) ("Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked.") (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal citations and alterations omitted)). Petitioners seek to remedy this infirmity by enacting a "policy of forbearance." Pet. Br. 31. In effect, the FCC asks that broadcasters trust the agency to "declin[e] to sanction" them when material was not clearly indecent. *Id.* Broadcasters, however, should not be expected to rely upon the FCC's unregulated discretion as guarantors of their First Amendment rights.

A. The FCC's Vague Indecency Standards Chill Speech That Is Undeniably Protected by the First Amendment.

Industry practices under the FCC's current indecency standard demonstrate the vagueness of this regime. In 2007, award-winning filmmaker Ken Burns directed a seven-part, 14 1/2-hour documentary about World War II entitled *The War*. This documentary, like many of Mr. Burns's other films, was broadcast on PBS. The film included former World War II soldiers speaking on camera and, to be true to the archival material, included profanity from the soldiers to describing the hellishness of their combat experience. The soldiers

also explained the meaning of common military euphemisms such as "fubar."[13]

The FCC's vague indecency standards led some PBS stations to air edited versions of *The War*. These stations included WETA, a co-producer of Mr. Burns's films which is based in Arlington, Virginia, and WHUT, which is based out of Howard University. In a telling quote, PBS's chief content officer stated:

> The core problem is, we don't really know what the FCC will do with a complaint because the guidelines aren't clear. . . . We all feel as confident as we can under the circumstances with the 'Saving Private Ryan' decision. But I still think if you're a general manager of a station in a community somewhere in the U.S., you have to think carefully about whatever jeopardy [airing an unbleeped 'War'] might cause you."[14]

This quote is emblematic of the issues facing broadcasters. The FCC's current standard provides virtually no guidance to broadcasters as to what

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[13] Paul Farhi, Fearing Fines, PBS to Offer Bleeped Version of "The War," Washington Post, August 31, 2007, available at http://www.washingtonpost.com/wpdyn/content/article/2007/08/30/AR2007083001945.html ("*PBS to Offer Bleeped Version of Ken Burns Documentary*"). The term "fubar," as explained in the film Saving Private Ryan, means "fucked up beyond all recognition."

[14] Farhi, "*PBS to Offer Bleeped Version of Ken Burns Documentary*."

constitutes indecency. Instead, broadcasters simply succumb to self-censorship and protected First Amendment speech is chilled.

This scheme was not always so. The FCC, however, adopted a policy in 2001 seeking to enforce "community standards" as to indecency. *Industry Guidance on Communication's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 ¶ 7-8 (2001) ("Policy Statement"). The Policy Statement also included a subjective, three-part test for determining when material is indecent. *Id.* ¶ 10. Just three years later, the FCC drastically altered its policy again to sanction fleeting uses of expletives. *See, e.g., In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 ¶ 12 (2004) (issuing fine for use of fleeting expletive by Bono of the musical group U2 at the Golden Globes awards show). These new "standards" essentially reversed over twenty-five years of FCC policy that, regardless of its faults, provided broadcasters with more-definite guidance as to what constitutes indecency.

The FCC's uneven application of these vague standards demonstrates the difficulty broadcasters (let alone the FCC) have in determining what constitutes indecency. For example, the FCC found, within the same opinion, that the word "bullshit" was patently offensive under contemporary community standards but not the word "dickhead." The FCC later found that the use of the word "bullshitter" was not indecent. Fox Br. in Opp. 8, 46.

The FCC's vague indecency standard leaves broadcasters with two unpalatable options: either air content that may be provocative in some way and risk massive fines or "steer far wider of the unlawful zone" to prevent fines. The risk of sanctions thus impermissibly "hovers over each content provider, like the proverbial sword of Damocles." *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (quoting *ACLU v. Reno*, 929 F.Supp. 824, 885-56 (E.D. Penn. 1996)).

B. The FCC's Erratic Enforcement Regime Validates This Court's Concerns About Vesting Administrative Agencies with Unrestricted Regulatory Discretion Over Protected Expressive Activities.

The FCC, in an effort to remedy its vague definition of indecency, promises it will enact a "policy of forbearance" by magnanimously "declining to sanction" broadcasters for airing material that the FCC would not clearly regard as indecent. Pet. Br. 31. This promise simply reinforces the obvious: the FCC has unrestricted discretion to decide what it believes constitutes (purportedly) indecent expression.

Yet the guidance provided by the FCC in this regard is as equally vague as the FCC's current indecency standard. Petitioners state, for example, that ABC "had sufficient notice that its broadcast of the nude adult images . . . might violate the FCC's indecency standards." Pet. Br. 31. This equivocal notice, standing alone, fails to provide broadcasters with definitive boundaries as to whether such images are actually indecent. Petitioners' position is even more problematic because it relies upon a "notice" that is over fifty years old, *id.* at 31-32; even the FCC

must concede that "community standards" have changed dramatically in the last fifty years. This purported notice was also vague fifty years ago: "the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464." *Id.* at 32 (quoting *Enbanc Programming Inquiry*, 44 FCC Rcd. 2303, 2307 (1960)).

The FCC cannot simply reserve for itself such unbridled discretion to evaluate when and how it choose to enforce its policies. *See City of Lakewood v. Plain Dealer Publg. Co.*, 486 U.S. 750, 764 (1988) ("[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker."). This Court has thus rejected government promises to limit enforcement of its statutes and regulatory schemes because these promises insufficiently protect against potential abuse.[15]

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[15] Even in the obscenity context, which receives no protection under the First Amendment, governments must still employ safeguards to minimize the risk of chilling protected speech. The government, therefore, cannot use "threat[s] of invoking legal sanctions and other means of coercion, persuasion, and intimidation" to prevent booksellers from challenging government determinations of objectionable content. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963); see also *Blount v. Rizzi*, 400 U.S. 410, 416 (1971) (finding procedures to censor obscene materials from the mails "violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression"); *Smith v. California*, 361 U.S. 147, 218 (1960) (striking down strict liability obscenity law because it created potential for self-censorship that would restrict

Indeed, this issue was recently addressed in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2009). Chief Justice Roberts, in a revealing exchange at oral argument, questioned the FEC's ability to limit the reach of 2 U.S.C. § 441b to certain types of media, *see id.* at 904: "But we don't put our – we don't put our First Amendment rights in the hands of FEC bureaucrats . . . ." *Citizens United v. Fed. Election Comm'n*, No. 08-205, 2009 WL 6325467, Tr. of Oral Argument, at *65-66 (Sept. 9, 2009); *see also Citizens United*, 130 S. Ct. at 904 ("This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.").

Dirks v. SEC, 463 U.S. 646, 664 n.24 (1983) reached a similar conclusion in an analogous situation.[16] At issue in *Dirks* was the censure of a securities analyst by the SEC for investigating and revealing a massive fraud. The broker learned of the information from a corporate insider, and the lower courts determined that the broker violated SEC Rule

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public's access to constitutionally protected material). The common thread running through these cases is a serious judicial concern with the implementation of laws that may create a chilling effect on constitutionally protected speech. These principles, which apply in the unprotected obscenity context, should apply with greater force to constitutionally protected indecent speech.

[16] This statement has implications beyond securities litigation, as the *Dirks* Court noted that imprecise rules prevent parties from complying with legal requirements. *Id.* at 658 n.17. The same principle, albeit in the First Amendment context, is at issue in these cases.

10b-5, 17 CFR § 240.10b-5. *Id.* at 649-52. The SEC brought its action even though an earlier SEC commissioner remarked that analysts and reporters would not be subject to insider trading liability. This Court specifically addressed that commissioner's statement when it explained that "rely[ing] on the reasonableness of the SEC's litigation strategy . . . can be hazardous." *Id.* at 664 n.24.

Nor does the proposed "policy of forbearance" bear any resemblance to the FCC's current policy. As compared to the twenty-five years after *Pacifica*, the FCC in the last ten years has brought more enforcement actions and imposed vastly higher fines. *See generally* Fox Br. in Opp. 5-10; ABC Br. in Opp. 23-26, 35-38. As these cases demonstrate, the FCC now frequently passes judgment, inconsistently, as to whether limited, non-sexual nudity[17] or coarse language[18] is indecent. These uneven decisions by the FCC only reinforce this Court's prior precedents

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[17] *Compare, e.g., WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838 (2000) (*"Schindler's List"*), *with Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* Notice of Apparent Liability for Forfeiture, 23 FCC Rcd. 1596 (2008).

[18] *Compare, e.g., Complaints Against Various Televisions Licensees Regarding Their Broadcast on November 11, 2004 of the ABC's Television Network's Presentaiton of the Film Saving Private Ryan*, 20 FCC Rcd. 4507 (2005), *with Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd. 2664 ¶ 82 (2006) (*"The Blues"*).

concerning the dangers of trusting government bureaucrats to police themselves when the public's rights are at stake.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the judgment of the Second Circuit Court of Appeals in favor of respondents.

/s/ J. Joshua Wheeler

J. Joshua Wheeler*
The Thomas Jefferson
Center for the Protection of
Free Expression
400 Worrell Drive
Charlottesville, Va. 22911
434-295-4784

The Media Institute
2300 Clarendon Blvd.
Suite 602
Arlington, Va. 22201
703-243-5700

*Counsel of Record

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Petitioners,

—v.—

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* YALE LAW SCHOOL INFORMATION SOCIETY PROJECT SCHOLARS, NEW AMERICA FOUNDATION, AND PROFESSOR MONROE PRICE IN SUPPORT OF NEITHER PARTY

PRISCILLA J. SMITH, ESQ.
Counsel of Record
NICHOLAS W. BRAMBLE, ESQ.
INFORMATION SOCIETY PROJECT
YALE LAW SCHOOL
319 Sterling Place
Brooklyn, New York 11238
(718) 399-9241
priscilla.smith@yale.edu

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Law Library

23

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Court Should Limit Its Inquiry to the Facts and Justifications of Indecency Regulations Rather Than Using This Case as a Forum to Examine Unrelated Controversies Concerning Spectrum Policy. 7

A. When the Federal Communications Commission Promulgates Indecency Regulations, The Scarcity Rationale Is Not Implicated. 7

B. Indecency Regulations Are Premised Upon the Rationale Recognized in *Pacifica*, Not the Scarcity Rationale Recognized in *Red Lion* and Other Precedents. 11

II. Despite Criticism, the Scarcity Rationale Now Occupies a Bedrock Role in Telecommunications Policy, Underlying a Wide Variety of Spectrum-Structuring Laws and Regulations. 16

A. The Spectrum Scarcity Rationale Supports Structural Regulations That Enable Wide Access to Diverse Information Sources. 17

B. The Spectrum Scarcity Rationale Supports Laws Providing Wide Access to Political and Educational Information. 19

C. The Scarcity Rationale Enables the FCC and NTIA to Tailor Spectrum Policy to Evolving Technological and Economic Circumstances. 21

D. The Court Has Imposed Clear Limits on the Role of the Scarcity Rationale. 23

III. Questioning the Scarcity Rationale in Dicta in This Unrelated Controversy Would Result In Unexpected, Systemic Consequences to the Current Model of Spectrum Allocation, Potentially Undermining Decades of Precedent Extending Far Beyond the Repeal of Indecency Regulations. 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc) .....*passim*

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. __, 131 S. Ct. 2806 (2011) 16, 21, 25

CBS v. FCC, 453 U.S. 367 (1981) .....*passim*

Citizens United v. Federal Election Comm'n, 130 S.Ct. 876 (2010) 20, 21

Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727 (1996) 13, 15

Dickerson v. United States, 530 U.S. 428 (2000) 29

FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1958) 18

FCC v. Fox Television Stations, Inc., 556 U.S. __, 129 S. Ct. 1800 (2009) 1

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 24

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FCC v. Pacifica Found., 438 U.S. 726 (1978) .....*passim*

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Fox v. FCC, 613 F.3d 317 (2d. Cir. 2010) 13

Greater New Orleans Broadcasting Ass'n v. FCC, 527 U.S. 173 (1999) 24

Hague v. CIO, 307 U.S. 496 (1939).....27

Kremens v. Bartley, 431 U.S. 119 (1977) 10

McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003) 19

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Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U. S. 1 (1986). 20

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93 F.3d 957 (D.C. Cir 1996) 17

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512 U.S. 622 (1994) 14, 28

Statutes, Regulations and Legislative Materials

Communications Act, 47 U.S.C. § 315 20

18 U.S.C. § 1464 8

47 C.F.R. § 15.5 23

Amendment of Section 3.606 of Comm'n's
Rules & Regulations, Sixth Report &
Order, 41 F.C.C. 148 (1952) 18

Complaints Against Various Broadcast
Licensees Regarding Their Airing of the
"Golden Globe Awards" Program, 19
F.C.C.R. 4975 (2004) 11

Complaints Regarding Various Television
Broadcasts Between February 2, 2002
and March 8, 2005, 21 F.C.C.R. 2664 (2006) 11

Complaints Regarding Various Television
Broadcasts Between February 2, 2002
and March 8, 2005, 21 F.C.C.R. 13299 (2006) 11

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and 777-792 MHz Bands, Second Report
& Order, 22 F.C.C.R. 15,289 (Aug. 10, 2007) 22

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Additional Spectrum for Unlicensed Devices Below

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INTEREST OF *AMICI CURIAE*[1]

Amici include Yale Law School Information Society Project scholars, the New America Foundation, and Professor Monroe Price, a First Amendment and media scholar.[2]

The Information Society Project at Yale Law School (ISP) is an intellectual center addressing the implications of new information technologies for law and society. Marvin Ammori, a Visiting Scholar at Stanford Law School and an Affiliated Fellow of the Yale ISP, publishes in First Amendment and Internet policy. Nicholas Bramble, a Lecturer in Law at Yale Law School and Director of the Law and Media Program at the Yale Law School ISP, has written articles on First Amendment law and information policy.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. Counsel for the respondents, on June 28, 2011, June 29, 2011, and July 1, 2011, and counsel for the petitioners, on July 8, 2011, have filed in this Court consent to the filing of amicus curiae briefs in support of either party or of neither party in fulfillment of S. Ct. Rule 37.3. This brief was written by Nicholas Bramble, Lecturer in Law at Yale Law School and Director of the Law and Media Program at the Information Society Project at Yale Law School, under the supervision of the undersigned Senior Fellow of the ISP, Priscilla Smith. Portions of this brief are derived from a brief written by Marvin Ammori and submitted to the Court in *FCC v. Fox Television Stations, Inc.*, 556 U.S. __, 129 S. Ct. 1800 (2009).

[2] The amici participate in this case in their personal capacity; titles are used only for purposes of identification.

The New America Foundation is a nonprofit, nonpartisan public policy institute that invests in new thinkers and new ideas to address the next generation of challenges facing the United States. One of its major projects is the Wireless Future Project, which develops and advocates policy proposals to promote universal, affordable and ubiquitous broadband and improve the public's access to critical wireless communication technologies.

Monroe Price, now a professor at the University of Pennsylvania's Annenberg School for Communication, was dean of Cardozo School of Law from 1982 to 1991. He is the author of several books on free speech and new media.

SUMMARY OF ARGUMENT

This case rests on a fairly narrow question concerning the constitutionality of broadcasting regulations designed to suppress and censor indecent speech. However, parties on both sides of this case have argued that this Court, in addressing such indecency regulations, should consider a much broader set of constitutional rationales for spectrum regulation. Broadcasters explicitly suggest that the "scarcity rationale" is properly before the Court. Amici submit this brief in support of neither party to stress that this overreaching is both unnecessary and unwise.

First, this Court's decision in *FCC v. Pacifica*[3] squarely addresses the constitutionality of indecency regulations and does not rely on the scarcity rationale. The Court can and should review the continuing vitality of *Pacifica* without questioning other lines of this Court's precedent wholly unrelated to indecency regulation. Simply put, the scarcity rationale associated with *Red Lion v. FCC*,[4] *NBC v. United States*,[5] *FCC v. Nat'l Citizens Comm. for Broad.*,[6] and *CBS v. FCC*[7] is wholly irrelevant to this case. The Court should follow its prudential rule of avoiding constitutional questions irrelevant to the case or controversy before this Court and merely address the indecency issue actually before the Court.

Moreover, a dispute over broadcasting indecency regulations offers an extremely ill-suited forum for revisiting the scarcity rationale and needlessly hurling into doctrinal chaos all of the spectrum policy that rationale supports. This rationale has never been invoked as a basis for indecency regulation. Indeed, Justice Brennan's dissent in *Pacifica* commends the majority, with which he disagrees, for understanding that the scarcity rationale is not relevant to indecency regulation. Nothing in the scarcity rationale underpinning *Red*

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[3] *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

[4] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

[5] 319 U.S. 190 (1943).

[6] 436 U.S. 775 (1978).

[7] 453 U.S. 367 (1981).

Lion, *NBC v. U.S.*, and other Court precedents justifies governmental decisions to engage in censorship or suppression of certain viewpoints.

Casting doubt on the scarcity rationale would inject uncertainty into a wide variety of actions that the government adopted by government in reliance on that rationale. These actions, many of which have been upheld by this Court, include imposing ownership limits and universal service obligations, promoting diverse uses of spectrum, experimenting with the limited authorization of unlicensed spectrum usage, implementing new economic models for the allocation of spectrum, providing equal time for political candidates, and so on. These laws generally attempt to broaden access to spectrum rights for more speakers, and are easily distinguishable from the suppression of speech evident in indecency regulations. It is for this reason, in fact, that this Court has clearly held that indecency regulations do not rely on the scarcity rationale implicated by these other governmental decisions.

The scarcity rationale forms the backdrop for all spectrum regulation, from television broadcasting to mobile Internet services. It suggests that because there are constraints on the availability and simultaneous usage of spectrum, the government must play a role in allocating rights to this spectrum, and the government may pursue allocations that ensure the widest availability of diverse and antagonistic sources of speech. Compared to other justifications for First Amendment scrutiny of spectrum licensing decisions, the scarcity rationale provides greater leeway for governmental decisions

to promote nondiscriminatory, universal access to diverse sources of speech.

While scarcity was a rationale in the *Red Lion* decision, which upheld a fairness doctrine repealed almost 25 years ago, many other decisions also rely on scarcity. For example, the government is currently seeking to auction billions of dollars of spectrum both to address debt obligations and to transfer more spectrum from older technologies like broadcast television to modern technologies including mobile Internet access. When the government seeks to auction this spectrum, it will decide among a range of auction mechanisms (possibly including two-sided auctions with broadcasters) and will impose rules ranging from nondiscrimination rules to build-out and service obligations. Such decisions enable spectrum to be used widely and effectively for a range of purposes. Without the scarcity rationale, these speech-focused government regulations might be subject to intrusive judicial second-guessing.

Even though, under this Court's precedent, indecency regulation does not implicate the scarcity rationale at all, several parties before the Court use this appeal of an indecency order to argue that the scarcity rationale for limiting judicial scrutiny of spectrum allocations has faded in importance. But a case concerning indecency regulations presents a dangerously underdeveloped vehicle for evaluating, questioning, or updating the rationales underlying spectrum regulation. Given that scarcity currently serves as the primary justification for the government's attempts to allocate spectrum and balance the claims of competing users, any effort by

the Court to evaluate this rationale requires more consideration than passing references in this case's briefs could ever provide.

Evaluation of this rationale should occur in the context of a proceeding that actually relies upon the scarcity rationale. Such a proceeding would offer the opportunity for greater analysis of the factual predicates for this rationale, and would give parties the chance to describe alternative rationales upon which the government might rely in allocating and structuring spectrum usage.

ARGUMENT

Amici caution the Court not to undermine the continuing vitality of the scarcity rationale underlying *Red Lion v. FCC*, *NBC v. United States*, *FCC v. Nat'l Citizens Comm. for Broad.*, and *CBS v. FCC* when determining whether the Federal Communications Commission's context-based approach to determining indecency is unconstitutionally vague. The Court may wish to extend its analysis beyond vagueness in order to examine prior justifications for limiting the degree of First Amendment scrutiny applied to broadcasting indecency regulations. But in evaluating the broader constitutionality of *indecency* regulations, which have heretofore been justified solely by the pervasiveness of broadcasting, its intrusive nature, and its accessibility to children, the Court need not examine the rationales underlying other broadcast decisions.

The scarcity rationale does not serve as a justification for indecency regulations and has not served as a justification for the FCC's actions in these proceedings. To question the scarcity rationale in this case would cast doubt upon every spectrum license and jeopardize a broad range of complex spectrum-structuring actions entirely unrelated to the promulgation of indecency regulations.

I. The Court Should Limit Its Inquiry to the Facts and Justifications of Indecency Regulations Rather Than Using This Case as a Forum to Examine Unrelated Controversies Concerning Spectrum Policy.

This Court's limited scrutiny of broadcasting indecency regulations has heretofore been justified by a set of rationales—pervasiveness, intrusiveness, and accessibility to children—having to do with the characteristics of broadcast media, not the scarcity of the spectrum on which that media is transmitted. The "scarcity rationale," which has never served as a justification for indecency regulations, is not at issue in this case. The Court should confine its analysis of the constitutionality of indecency regulations to the actual rationales that have been used to support such regulations.

A. When the Federal Communications Commission Promulgates Indecency Regulations, The Scarcity Rationale Is Not Implicated.

The government structures spectrum licenses in numerous ways. Typically, the government employs a wide range of spectrum allocation decisions, auctions, ownership limits, and authorizations of unlicensed use to ensure that those who obtain access to spectrum are not creating interference and are promoting wide access by the public to diverse and antagonistic sources of speech.[8] In a narrower range of cases,[9] the government seeks to condition spectrum licenses upon an obligation to stamp out indecent or obscene speech.[10] With the former set of actions, the government is attempting to add speech and speakers into the mix available to the public. With the latter set of actions, the government is attempting to remove certain kinds of speech from the mix.[11]

Two different lines of precedent govern the constitutionality of these two different sets of governmental actions.[12] Under *Red Lion* and

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[8] *See, e.g., CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[9] *See, e.g., Action for Children's Television v. FCC*, 58 F.3d 654, 658 (D.C. Cir. 1995) (en banc).

[10] *See, e.g.*, 18 U.S.C. § 1464 (prohibiting the broadcasting of indecent language).

[11] *See, e.g., Action for Children's Television*, 58 F.3d at 658 (describing regulations that "ban[] all broadcasts of indecent material").

[12] *Compare FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding the FCC's fine for a radio broadcast of George Carlin's "Seven Dirty Words" monologue) *with Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (articulating a less rigorous standard of scrutiny for broadcasting laws or

associated cases, constraints on the *availability* of spectrum justify governmental policies that ensure spectrum is used widely and effectively for a range of purposes. By contrast, under *Pacifica* and associated cases, the *characteristics* of broadcasting—including its pervasiveness, intrusiveness, and accessibility to children—have justified censorship of certain kinds of disfavored speech.[13] It is important to maintain a firm distinction between these two lines of precedent, given that one is primarily about the addition of speech and serves to support numerous technical spectrum-allocation policies, while the other is primarily concerned with the suppression of speech in a narrower range of contexts.

Yet broadcast network respondents, in their opposition to the government's petition for certioriari in this case, indicated that they plan to bring up "fundamental questions" relating to "the underlying constitutionality of regulating broadcast speech" as well as "whether the Court's decisions in *Pacifica* and *Red Lion* should be overruled."[14] ABC argues that "developments since *Red Lion* have rendered the predicate for that decision untenable today" and

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regulations that promote the wide dissemination of diverse content).

[13] *Pacifica*, 438 U.S. at 748-49; *see also Action for Children's Television*, 58 F.3d at 660-61 (identifying governmental interests in "support for parental supervision of children" and "a concern for children's well-being" as sufficient to support indecency regulations).

[14] Brief in Opp'n of Fox, On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 27.

suggests that the Court subject all "content-based restrictions on broadcasters' expression" to strict scrutiny.[15] The government itself attempts to link *Red Lion* and the spectrum-scarcity rationale to this case by describing scarcity as one of three primary justifications—along with the pervasive presence of broadcast media and the unique accessibility of such media to children—for limited First Amendment scrutiny of a requirement that licensees "accept content-based restrictions that could not be imposed on other communications media."[16]

In seeking review of these "fundamental questions," respondents are attempting to bootstrap their opposition to the *Pacifica* indecency regime into a much broader attack upon the FCC's ability to structure spectrum licenses. Petitioners, meanwhile, attempt to frame this case around fundamental questions about the sources of authority for broadcast regulation, rather than defending indecency regulations solely on the narrower "pervasive and uniquely accessible" rationales set forth in *Pacifica*. But both sides reach far beyond the facts of this case. The Court need not and should not deal with these broader theoretical questions when it is capable of tethering its analysis to the facts and rationales of the indecency regulations presently before it.[17] This case concerns the constitutionality of

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[15] Brief in Opp'n of ABC, Inc. et al., On Petition for a Writ of Certiorari, No. 10-1293, May 23, 2011, at 30, 32.

[16] Pet'r's Br. 42-44.

[17] *See Kremens v. Bartley*, 431 U.S. 119, 136 (1977) ("[The] Court will not formulate a rule of constitutional law broader

regulations that suppress speech, not the constitutionality of rules and requirements that promote wider access by the public to more diverse types of speech. To support this distinction in its analysis of the constitutionality of indecency regulations, the Court should train its attention on *Pacifica*, not on *Red Lion*.

B. Indecency Regulations Are Premised Upon the Rationale Recognized in *Pacifica*, Not the Scarcity Rationale Recognized in *Red Lion* and Other Precedents.

Although *Red Lion*, *NBC v. United States*, *FCC v. NCCB*, and *CBS v. FCC* rest upon a set of rationales that have been the subject of strenuous academic debate, these rationales are simply not at issue in this case, and this case does not present a proper vehicle for questioning such rationales.

First, the FCC did not rely upon the scarcity rationale of *Red Lion* in issuing the broadcasting indecency orders at issue here.[18] This Court cannot

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than is required by the precise facts to which it is to be applied.").

[18] *See* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664 (2006); Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd 4975, at ¶ 3 n.4 (2004); Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 13299, n.18 (2006).

supply and then evaluate a basis for the FCC's actions that the FCC itself did not provide.[19]

Second, this Court has explicitly rejected the FCC's attempt to offer the *Red Lion* scarcity rationale as a basis for its indecency regulations. Justice Brennan, dissenting in *Pacifica*, approvingly described the majority's rejection of scarcity as a basis for indecency regulation: "The opinions . . . rightly refrain from relying on the notion of 'spectrum scarcity' to support their result. . . . '[A]lthough scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship.'"[20]

Third, this Court has cited three primary reasons for limiting its scrutiny of government regulation of broadcasters' indecent speech: the broadcast media "have established a uniquely pervasive presence in the lives of all Americans," "confront[] the citizen . . . in the privacy of the home," and are "uniquely accessible to children, even those too young to read."[21] *Pacifica* thus squarely articulates the rationale for broadcasting indecency regulations. Because this case concerns the constitutionality of such indecency regulations, the rationales in *Pacifica* for limited scrutiny of indecency regulations are now open to reanalysis. The Court may wish to consider whether

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[19] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[20] *Pacifica*, 438 U.S. at 770 n.4.

[21] *Id.* at 748-49.

broadcasting retains its characteristics of pervasiveness, intrusiveness, and accessibility to children, particularly in light of the diminishing power of broadcasting in a world with countless new sources of information and media distribution.[22]

But these rationales for limiting scrutiny of indecency regulations—pervasiveness, intrusiveness, and accessibility to children—are absent from cases that justify the constitutionality of spectrum regulations. *Red Lion* rests on a different set of bases: "the scarcity of broadcast frequencies," the government's "role in allocating" those frequencies, and the "legitimate claims" of competing "possible users."[23] In a case concerning the constitutionality of regulations designed to suppress and censor indecent speech, it is the rationales in *Pacifica*, not those in *Red Lion*, that are at issue.

Fourth, the Court has articulated two starkly different approaches towards speech in *Pacifica* and *Red Lion*. The line of precedent associated with *Pacifica* is about censorship and suppression of

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[22] *See Fox v. FCC*, 613 F.3d 317, 326 (2d. Cir. 2010) ("[W]e face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. . . . The same cannot be said today. The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus.").

[23] 395 U.S. at 400-01.

indecent speech.[24] In *Red Lion*, by contrast, the Court was not concerned with censorship of speech.[25] *Red Lion* focused on something different: the addition and diversification of speech.[26] The point of *Red Lion* and associated cases is that when (a) there are constraints on the availability of spectrum and (b) the government is responsible for allocating this spectrum, the government can try to ensure that this spectrum facilitates diverse, antagonistic, and high-value speech. Such cases pertain to communications laws and regulations that are designed to promote the availability of diverse and antagonistic sources of information and the wide distribution of this information to all members of the public.[27]

Fifth, the two lines of cases rest on different and sometimes incompatible governmental interests. *Pacifica* and related cases set forth a governmental interest—protecting children from harmful information—squarely related to the regulations at

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[24] *See, e.g., Action for Children's Television*, 58 F.3d at 660; *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality).

[25] *See* 395 U.S. at 396 (declining to address whether the First Amendment authorizes "government censorship of a particular program").

[26] *Id.* at 401 n.28 (freedom of speech is not abridged where the government "directly or indirectly multipl[ies] the voices and views presented to the public.").

[27] *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (summarizing the underlying principle of communications laws and policies "that the dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

issue in this case.[28] The Court acknowledged a separate set of governmental interests in *Red Lion*: ensuring public access to "the widest dissemination of diverse and antagonistic sources," allowing the public to "receive suitable access to social, political, esthetic, moral and other ideas and experiences," and promoting effective use of the spectrum for communication.[29] These governmental interests in promoting wide access to diverse speech are unrelated to the suppression of speech and the protection of children.

Finally, the laws that have been built up around these two contrasting lines of cases differ in their focus and function. The constitutional holding in *Pacifica* justifies laws or regulations that allow the government to engage in suppression of certain content or viewpoints.[30] In contrast, *Red Lion* justifies (1) laws structuring the media environment to ensure the widest dissemination of information from diverse sources (such as ownership limits, must-carry rules, and universal service mandates); (2) laws ensuring an informed citizenry through promotion of political, educational, or noncommercial information; and (3) spectrum policy rules governing technologies as diverse as satellite television and the wireless internet. The laws enabled by *Pacifica*

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[28] *See Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

[29] *Red Lion*, 395 U.S. at 360.

[30] *See e.g., Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality).

target and restrict speech, whereas the structural laws and regulations enabled by *Red Lion* support wide access to diverse speech.

II. Despite Criticism, the Scarcity Rationale Now Occupies a Bedrock Role in Telecommunications Policy, Underlying a Wide Variety of Spectrum-Structuring Laws and Regulations.

If this Court concludes that justifications for limited scrutiny of indecency regulations are no longer sustainable, such a conclusion should not affect the constitutional status of laws and regulations premised on the spectrum-scarcity rationale associated with *Red Lion*. If anything, the reevaluation of the constitutional basis for indecency regulations—in conjunction with the repeal of other regulations that had the potential to reduce media diversity and accessibility—offers an opportunity to clarify that the rationales for censorious broadcast regulation are irrelevant to the rationales for spectrum access regulation in general.

Red Lion and its associated line of cases serve as bedrock precedent for several classes of laws, all of which differ from indecency regulations and enable what this Court recently reaffirmed as a guiding First Amendment principle: "the unfettered exchange of ideas" in a variety of forums.[31] Revisiting

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[31] *See Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. __, 131 S. Ct. 2806 (2011) (citing *Buckley v. Valeo*, 424 U. S. 1, 14 (1976)).

or questioning *Red Lion* in this proceeding would have numerous unpredictable effects upon these foundational laws governing United States media, spectrum, and Internet policy.

A. The Spectrum Scarcity Rationale Supports Structural Regulations That Enable Wide Access to Diverse Information Sources.

The spectrum scarcity rationale underpins a wide variety of laws and regulations—including ownership limits, access rules, and universal service rules—that attempt to foster broad access to communications tools and broad distribution of information via those tools.

Relying in part on the *Red Lion* interest in fostering diverse and antagonistic sources of information, this Court and lower courts have upheld broadcast media ownership limits[32] and must-carry rights.[33] In *Turner Broadcasting Sys., Inc. v. FCC*, which relied on the spectrum scarcity rationale,[34] the

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[32] *See, e.g., FCC v. NCCB*, 436 U.S. at 802; *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 476-77 (2d Cir. 1971) (upholding financial interest and syndication rules and prime time access rules);

[33] *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 975-79 (D.C. Cir 1996).

[34] 512 U.S. at 637 ("As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale,

Court held that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[35] And relying on the separate *Red Lion* interest in promoting the wide dissemination of information, this Court has upheld the FCC's attempt to implement universal service goals[36] through its allocation of broadcast licenses.[37]

Unlike indecency laws, these structural laws and regulations do not suppress disfavored content, and have been subject to only minimal First Amendment scrutiny. Questioning the spectrum scarcity rationale in this case would, as discussed *infra*, likely lead to unintended and wide-ranging consequences for a range of laws and regulations unrelated to those at issue in this case.[38]

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they would interfere with one another's signals, so that neither could be heard at all.").

[35] *Id.* at 663.

[36] *See, e.g.*, Amendment of Section 3.606 of Comm'n's Rules & Regulations, Sixth Report & Order, 41 F.C.C. 148, 167 (1952) (providing as the first three priorities of allocation: "(1) To provide at least one television service to all parts of the United States. (2) To provide each community with at least one television broadcast station. (3) To provide a choice of at least two television services to all parts of the United States.").

[37] *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 360 (1958).

[38] *See infra* Part III.

B. The Spectrum Scarcity Rationale Supports Laws Providing Wide Access to Political and Educational Information.

Second, *Red Lion* retains precedential value for laws that seek to promote an informed electorate through encouraging the provision of wide access to political, educational, and noncommercial programming. Many such laws are currently in place.

In *CBS, Inc. v. FCC*, the Court upheld the requirement that broadcasters grant access to federal candidates, because the rule promoted "the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[39] This Court has permitted governmental efforts "to enhance the volume and quality of coverage of public issues through regulation of broadcasting."[40] And *Red Lion* served as one basis for the implementation of a campaign disclosure requirement,[41] which this Court has noted "can provide shareholders and citizens

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[39] 453 U.S. at 396.

[40] *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. at 800, 802 (upholding broadcasting ownership limitations as reasonable means to "enhance the diversity of information heard by the public").

[41] *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 237, 240-41 (2003) (reasoning that record-keeping requirements would assist in determining whether "broadcasters are too heavily favoring entertainment, and discriminating against broadcasts devoted to public affairs").

with the information needed to hold corporations and elected officials accountable for their positions and supporters."[42]

Even laws that more directly solicit diverse speech, such as equal time provisions, are dependent upon the scarcity rationale. Section 315 of the Communications Act, for instance, states that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[43]

Such laws are best seen as speech-promoting alternatives to the direct regulation of political speech. Rather than suppressing or chilling speech, Section 315, which seeks to give lower-cost time to a broader array of candidates and thereby increase decentralized public participation in the political process, helps ensure that no candidate or issue is "free from vigorous debate."[44] Impeding the operation of this law would harm discussion of public issues by narrowing the scope of political speech to those candidates and those issues that a small handful of broadcasters deemed worthy of airtime.

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[42] *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 916 (2010).

[43] 47 U.S.C. § 315.

[44] *See Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1, 14 (1986).

As this Court has recently affirmed, "'[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government."[45] "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[46] *Red Lion* and associated cases support the creation of infrastructure in which this right can be effectively exercised. Questioning the scarcity rationale would risk dismantling this infrastructure by casting serious doubt upon laws and policies that ensure the doors to debate are open and the discussions taking place therein are vigorous and antagonistic. This case, narrowly concerned with the constitutionality of indecency regulations, does not represent a useful forum for considering such consequences.

C. *Red Lion* Enables the FCC and NTIA to Tailor Spectrum Policy to Evolving Technological and Economic Circumstances.

Third, beyond structural rules and political and educational access rules, a large number of the government's spectrum policies also rest upon rationales articulated in *Red Lion* and associated cases. The FCC structures spectrum for private use, while the National Telecommunications and

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[45] *Arizona Free Enterprise Club*, 564 U.S. at _, 131 S.Ct. _ (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

[46] *Citizens United*, 130 S.Ct. at 898.

Information Administration allocates, assigns, and regulates government spectrum. The framework of *Red Lion* continues to allow these agencies to take into consideration a wide-ranging set of regulatory choices when adapting spectrum licenses to private and governmental parties.

Red Lion enables the FCC to experiment with different possible technical and economic plans in structuring spectrum allocation and use. The FCC can tailor different licenses to different types of use, including terrestrial radio broadcasting, terrestrial television broadcasting, satellite television broadcasting, satellite radio broadcasting, wireless cell phone networks, taxi dispatching, public safety, unlicensed uses, and microwaves. It can assign licenses via comparative hearings, lotteries, auctions, and on a first-come first-served basis. It can exercise its authority to clear bands of existing users to enable new uses.[17]

Beyond licensing, the FCC has used its spectrum policy authority to authorize a variety of "unlicensed" uses of spectrum. Rather than assigning licenses to particular users, these allocations of unlicensed spectrum rely upon "smart radios" possessed by end users that are capable of managing interference on their own using advanced computing

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[17] *See, e.g.*, Service Rules for the 698-746, 747-762, and 777-792 MHz Bands, Second Report & Order, 22 FCC Rcd 15,289, 15,296 (Aug. 10, 2007) ("The DTV Act set a firm deadline of February 17, 2009 for the 700 MHz Band spectrum to be cleared of analog transmissions and made available for public safety and commercial services as part of the DTV transition.").

technologies.[48] A large variety of laptops and mobile telephones today, for instance, are equipped with wi-fi radios that enable wireless connections to Internet routers. The FCC has a minimal certification process in place to ensure that these and other devices can take advantage of the broad potential uses of unlicensed spectrum without creating interference.[49]

As spectrum becomes increasingly important to the satisfaction of basic communications needs, and as control over existing spectrum becomes more concentrated, it becomes correspondingly important for the government to have the tools it needs to ensure broad and open access to this communications capability.

It would be particularly unfortunate if, in a case about the constitutionality of broadcast indecency regulations, the Court inadvertently undermined the authority for these technical policy decisions and handcuffed the FCC's broad, flexible mandate to regulate the spectrum to serve the public's interest.

D. When the Federal Communications Commission Promulgates Indecency Regulations, The

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[48] *See* Eli Noam, *Spectrum Auction: Yesterday's Heresy, Today's Orthodoxy, Tomorrow's Anachronism. Taking the Next Step to Open Spectrum Access*, 41 J. LAW & ECON. 765, 778-80 (1998) (discussing how to enable dynamic real-time markets in spectrum usage).

[49] *See, e.g.*, 47 C.F.R. § 15.5.

Scarcity Rationale Is Not Implicated.

Nothing in the rationale for the laws and regulations listed above should be understood to justify laws that support the censorship or suppression of certain viewpoints. Were the government to use *Red Lion* as a pretext to target and suppress particular views and particular content, courts can rely upon heightened standards of First Amendment scrutiny for laws or regulations that suppress editorializing,[50] commercial speech,[51] indecency,[52] and particular political viewpoints.[53] This particular case—and the effort to evaluate the constitutionality of censorship and content regulation separately from the constitutionality of access and structural regulation—is in large part about ensuring that the government does not engage in censorship under the cover of decisions regarding spectrum licensing and access.

Some have argued that *Red Lion* serves to justify viewpoint- and content-based restrictions of speech based on the Court's approving references to the fairness doctrine in that case. But *Red Lion* is

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[50] *See FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

[51] *See, e.g., Greater New Orleans Broadcasting Ass'n v. FCC*, 527 U.S. 173 (1999).

[52] *See Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc).

[53] *See News America Publishing Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

not the fairness doctrine. Indeed, in *Red Lion*, the Court said it would revisit the issue of the fairness doctrine's constitutionality if evidence demonstrated that the doctrine reduced, rather than enhanced, the quality and diversity of political coverage.[54] When the fairness doctrine was later repealed, neither the FCC nor courts suggested that *Red Lion* itself should be overturned.[55]

With the repeal of the personal attack rule and the fairness doctrine, the government took affirmative steps to ensure that spectrum access policies could be justified without reference to regulations that censor, target certain viewpoints, or seek to level a playing field.[56] In separating its analysis of the justification for indecency regulations from any analysis of the spectrum scarcity rationale, the Court can continue to maintain this firm distinction between censorship-promoting rationales and access-promoting rationales. Maintaining the separateness of these rationales will ensure that this case does not inadvertently hinder Congress, the FCC, and the NTIA from tailoring longstanding

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[54] 395 U.S. at 393 ("And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.").

[55] *See, e.g., Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

[56] *Cf. Arizona Free Enterprise Club*, 564 U.S. at __ ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech.").

public interest concerns to the challenges brought about by new technologies and communications tools.

III. Questioning the Scarcity Rationale in Dicta in This Unrelated Controversy Would Result In Unexpected, Systemic Consequences to the Current Model of Spectrum Allocation, Potentially Undermining Decades of Precedent Extending Far Beyond the Repeal of Indecency Regulations.

Any reconsideration of the scarcity rationale for spectrum allocation and regulation should occur in the context of a proceeding that tees up the numerous complex issues that would arise in the event that the current rationale for spectrum licensing were undermined. These complex technological and legal issues include: whether current allocations of spectrum are defensible under strict scrutiny; whether any shift away from spectrum licensing should involve the assignment of property rights in spectrum or the facilitation of unlicensed uses of spectrum; how to handle the sudden jeopardization of thousands of spectrum licenses conferred by the FCC or held by the government; and other unforeseeable consequences of the abandonment of relied-upon rules of the road.

Questioning the justifications for *Red Lion*, *NBC v. United States*, *FCC v. NCCB*, and *CBS v. FCC* in a case where these issues have not been properly briefed would both distract from the reevaluation of the constitutional basis for limited First Amendment scrutiny of indecency regulations and likely generate wide-ranging unintended effects.

First, if the scarcity rationale were deemed an invalid basis for spectrum licensing, any licenses to use spectrum to engage in speech would be subject to a more rigorous standard of scrutiny, given the general presumption that the government should not be in the business of licensing speakers.[57] If the standard in *Forsyth County* were held to prevail, the government would need to defend each spectrum license under a standard of strict scrutiny, particularly where it was granting disproportionate benefits and spectrum to certain types of speakers over others.

Under intermediate or strict scrutiny, the government might be unable to justify the current highly broad allocation of spectrum to broadcasters. Such allocations of spectrum to broadcasters include the vast "white spaces" of spectrum set aside to protect broadcasting signals from interference. The FCC has recognized that these "white spaces" could instead be used to provide high-speed, mobile Internet access to millions of underserved Americans.[58]A decision to continue to dedicate this valuable swath of spectrum to over-the-air broadcasting, which provides access to limited

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[57] *See Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992); *see also Hague v. CIO*, 307 U.S. 496 (1939).

[58] *See* Unlicensed Operation in the TV Broadcast Bands, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, Second Memorandum Opinion & Order, 25 FCC Rcd 18,661 (Sept. 23, 2010) (updating rules authorizing the operation of unlicensed wireless devices in areas of broadcast television spectrum unused by licensed services).

programming upon which an increasingly diminishing number of Americans rely,[59] as opposed to Internet access, which provides access to a wider breadth of diverse and antagonistic information sources, would be difficult to justify under any form of heightened First Amendment scrutiny.

Even if the lesser standard of intermediate scrutiny under *Turner* were to apply, such a standard would subject the FCC's decisions to constant scrutiny as spectrum licensees argued that burdens placed upon their speech by a variety of structural rules were disproportionate to the governmental interests thereby furthered.[60] Applying *Turner* to spectrum policy would mire the FCC in years of litigation with respect to decisions regarding spectrum allocation, licensing, authorization for unlicensed use, band-clearing, and conditioning existing licenses for data roaming or open access. Such action by the Court would disturb reliance interests based upon current spectrum allocation and structuring policies. Such action would additionally constitutionalize a framework for judicial supervision of FCC action that is far less conducive to public interest regulation and less

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[59] A study from 2008 estimated that only 13% of American households with television service relied primarily on broadcast programming over the air, compared to 87% of households subscribing to cable and satellite television services. *See* Sascha D. Meinrath & Michael Calabrese, *Unlicensed "White Space Device" Operations on the TV Band and the Myth of Harmful Interference* (Mar. 2008), *available at* http://www.newamerica.net/files/WSDBackgrounder.pdf.

[60] *See Turner I*, 512 U.S. at 662.

responsive to evolving industry characteristics than the current model of agency rulemaking.

For example, the FCC is in the process of making difficult technical and policy decisions as to whether and where unlicensed uses of spectrum should be expanded and licensed uses reduced.[61] For this Court to question the scarcity rationale and require that the government shift away from its current model for spectrum-allocation decisions would cast doubt upon the constitutionality of such ongoing regulatory processes. This judicial resolution of a highly technical issue regarding spectrum allocation would be troubling in its own right, and particularly troubling given that parties to a case concerning indecency regulations are unlikely to brief this issue—or any of the other issues described above—in detail.

There may be some "special justification" in the evolving character of the technology and media landscape to support a departure from precedent in the context of broadcasting indecency regulations,[62] but this case does not offer a clear forum for examining the risks and justifications of a sharp departure from precedent in the context of scarcity-based regulations.

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[61] *See* Unlicensed Operation in the TV Broadcast Bands, Second Memorandum Opinion & Order, 25 FCC Rcd 18,661.

[62] *See Dickerson v. United States*, 530 U.S. 428, 443 (2000).

CONCLUSION

Upon reassessing the basis for limited constitutional scrutiny of broadcast indecency regulations, the Court may choose to strike down the government's reliance on *Pacifica* to limit speech. But in fighting back this censorship, the Court should not reach beyond the immediate case and controversy surrounding indecency regulations and jeopardize the feasibility of an array of spectrum-structuring laws and policies.

Respectfully submitted.

PRISCILLA J. SMITH, ESQ.
(Counsel of Record)
NICHOLAS W. BRAMBLE, ESQ.
INFORMATION SOCIETY PROJECT
YALE LAW SCHOOL
319 STERLING PLACE
BROOKLYN, NY 11238

Counsel for Amici Curiae

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